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AMENDING THE NATIONAL ENVIRONMENTAL POLICY ACT

HEARING

BEFORE THE

SUBCOMMITTEE ON SUPERFUND, OCEAN,
AND WATER PROTECTION

OF THE

COMMITTEE ON
ENVIRONMENT AND PUBLIC WORKS
UNITED STATES SENATE

ONE HUNDRED FIRST CONGRESS

FIRST SESSION

ON

S. 1045 AND S. 1089

BILLS AMENDING THE NATIONAL ENVIRONMENTAL POLICY ACT

JUNE 1, 1989

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AMENDING THE NATIONAL ENVIRONMENTAL POLICY ACT

THURSDAY, JUNE 1, 1989

U.S. Senate,
Committee on Environment and Public Works,
Subcommittee on Superfund, Ocean,
and Water Protection,
Washington, DC.

The subcommittee met, pursuant to notice, at 2:13 p.m., in room SD-406, Dirksen Senate Office Building, Hon. Frank R. Lautenberg (chairman of the subcommittee) presiding.

Present: Senators Lautenberg and Durenberger.

Also present: Senator Reid.

OPENING STATEMENT OF HON. FRANK R. LAUTENBERG, U.S. SENATOR FROM THE STATE OF NEW JERSEY

Senator Lautenberg. I will call the subcommittee hearing to order.

I am sorry that we were a little delayed, but we will try to make up for time lost by succinct testimony, short questions, brief answers, all perfectly on target.

This afternoon's hearing will consider two bills to amend the National Environmental Policy Act. The first bill, S. 1089, which Senators Durenberger and Chafee join me in introducing today, makes a number of improvements to NEPA. The second bill, S. 1045, which was introduced by Senator Symms, addresses environmental impact assessments by multilateral banks.

The goal of NEPA is to improve the quality of individual Federal decisions that affect the environment. The environmental impact statement process ensures that decisions are made only after a thorough examination of alternatives and rigorous consultation with Federal agencies and the public. This ensures that the agency officials and the public are made aware of the environmental impacts and that the public has had an opportunity to comment upon and to become involved in the decisionmaking process.

The success of NEPA is indisputable. The bill I have introduced today amends NEPA so as to address problems which have arisen since the law was last amended, and I want to highlight a few of these issues.

First, the bill requires CEQ to issue regulations to ensure that the environmental impact statements address global environmental issues, including the cumulative impacts of proposed Federal actions on global climate change and ozone depletion. The EIS process is rarely used with respect to these problems.

Last fall, the CEQ prepared guidelines that would have required Federal agencies to study the impact of their actions on global climate change and ozone depletion. Unfortunately, the Reagan administration, in one of its last acts, decided against issuing this guidance.

The current administration has not yet acted. This is clearly unacceptable. President Bush has said, "Those who think that we are powerless to do anything about the greenhouse effect are forgetting about the White House effect. As President," he went on to say, "I intend to do something about it."

Yet the President seems unable to take the simple action of ordering Federal agencies to consider this and other global environmental issues in their impact statements. This failure undercuts the adminstration's claims to be moving aggressively and to be taking a leadership role in addressing the consequences of global warming. It is also inconsistent with NEPA, and I hope that the administration will act expeditiously to issue these guidelines.

Second, I believe the time has come to strengthen the CEQ to implement its responsibilities under NEPA. The Council serves a critical role in coordinating Federal agency environmental programs and policies and advising the President on the vast range of environmental issues.

Under President Reagan, the Council budget and staff were reduced significantly, and the President failed to use the Council in a meaningful way to coordinate his environmental policy. A number of ideas to accomplish this goal were suggested in a publication called "The Blueprint for the Environment." This report was prepared by the environmental community for the President. At today's hearing, we will explore these and other suggestions to strengthen the Council.

The bill also clarifies that NEPA applies to all Federal actions, not just those in the United States. In 1975, President Carter issued Executive Order 12114 to require Federal agencies to take certain international environmental under consideration.

But some of the other requirements of NEPA, particularly the public participation provisions, are not required for these actions. The executive rider also includes numerous exemptions, including votes in international organizations.

As a result, the environmental impact statement process has rarely been used for Federal actions with extraterritorial impacts. According to a CEQ survey, the total number of actions falling within the executive order between 1985 and late 1987 was 45, or roughly an average of 15 per year.

This practice is inconsistent with the goals and policies of NEPA. This is particularly true for United States votes on projects at multilateral banks. These projects can have significant environmental impacts; yet the banks fail to routinely consider the environmental impacts of projects it funds and to have the public involved in this review process.

At today's hearing, we will also consider legislation introduced by Senator Symms to have the multilateral banks routinely use an environmental assessment process prior to decisions about bank projects.

President Bush and EPA Administrator Reilly both have called for the United States to be at the forefront of international environmental challenges. Certainly those of you who watched the President's speech yesterday in Germany, his comments in Brussels as well, noted that he called attention to the fact that we all have to get on with the task of helping to clean up the environment. They were very well received statements. The applause was pretty vigorous, as I saw it, and the interest of the countries participating was also fairly aggressive.

So it is important that we, within our government, do the things that lead us in the right direction. We can hardly be in the forefront with our existing position on the applicability of NEPA to extraterritorial actions if we have not taken serious action on ourselves here.

So I look forward to hearing our witnesses address these and other issues. Senator Symms is unable to be here today because of a personal problem. He is very interested in these issues, and we will be discussing these with him, and perhaps he will have some questions for the record. I would ask that the witnesses respond expeditiously to any questions that he or any other members may submit for the record.

I have here statements from both Senator Symms and Senator Durenberger that we will put into the record.

[The statements referred to follow:]

OPENING STATEMENT OF HON. STEVE SYMMS, U.S. SENATOR FROM THE STATE OF IDAHO

Mr. Chairman, as you know, I have a keen interest in a particular issue in today's hearing, the National Environmenal Policy on International Financing Act.

That bill, sponsored by every member of the Senate Environment Committee, represents a good year's work at trying to address a critical problem, the continuing involvement of the United States in international lending programs that can be environmentally destructive.

One of the principle concepts that we have incorporated in the bill this year is a healthy respect for the need to build international consensus when approaching lending institutions about their environmental performance. Acting strictly from a unilateral stance, the United States is virtually powerless in most multilateral banks. Acting in concert with other nations, however, we can achieve some dramatic changes.

The change we are seeking with this bill is the development of timely, consistent environmental assessments of lending proposals, including public involvement. In many borrowing countries, especially those with "closed" societies, this goal will be difficult. It will certainly be necessary to achieve the broadest possible consensus when requesting banks to adopt such an environmental assessment program.

There are some, however, who may attempt to use the importance of international concensus as an argument for minimizing the role of the United States in promoting this goal. The flaw in that argument is that it assumes that international concensus will achieve the goal by itself.

Ask yourself, what is it that we are requesting of other contries when we "build consensus." Aren't we asking them to join us in "actively" pursuing the same environmental assessment goals? How can the United States pursuade another country to "actively" pursue a goal that we ourselves are not pursuing (except by asking other countries to pursue it).

Building concensus is important, but, by itself, will accomplish nothing. International concensus can be a powerful force, but that force must be applied to reach a certain end. In this case, if we build international concensus that the banks ought to improve their environmental performance, and then stop there, the performance of MDBs will not be affected.

S. 1045 lays out a way in which the United States, acting fully within its rightful authority as a member of a multilateral bank, can "actively" pursue an improved environmental assessment process. The bill requires the U.S. Treasury to request an assessment, review the assessment for minimum criteria, and then to critique its shortfalls. This is exactly what we would hope other countries would do who share our consensus about the need to address this particular problem.

While it is true that concensus is important, it is also important that the United States show some leadership in "actively" pursuing the objective of that concensus.

I urge my colleagues on the committee to recognize the fine line that S. 1045 must walk. While "actively pursuing" a goal, the bill does not involve such mechanisms as constraining the vote of the United States within the banks. This may be seen by some, notibly the Sierra Club and NRDC, as a sign of weakness on the part of the United States. They may be right. But in an attempt to ensure that U.S. efforts do not appear as an undue use of unilateral influence, the bill has purposefully been drafted so that U.S. actions are "weak."

It is this dichotomy, between the need to be actively pursuing a goal, and the need to pursue it in unison with other countries, that constitutes the "fine line" of S. 1045.

While I'm sure that there will be several positive suggestions coming out of this hearing, I would hope the Committee would closely scrutinize any suggestion that we deviate from that "fine line." To stray too far from it, on either side, jeopardizes the effectiveness of the entire initiative.

OPENING STATEMENT OF HON. DAVE DURENBERGER, U.S. SENATOR FROM THE STATE OF MINNESOTA

Mr. Chairman, I am pleased to join with you on legislation to reauthorize the Office of Environmental Quality and to strengthen the National Environmental Policy Act.

As we begin the legislative process with these hearings, I want to say that I am open to a thorough rethinking of the role that the Council on Environmental Quality plays in the governmental process. Many of our witnesses will suggest significant changes in the structure and operation of CEQ and we should take a close look at those proposals.

But I think we also need to keep in mind that the CEQ serves the president. I hope that President Bush will elevate this function in the White House. I understand that he is moving in that direction. But the role of CEQ is probably a question best left to Presidents rather than subcommittees of the Senate. We should make it possible for the President to better utilize the resources of CEQ, but we ought not to dictate the role that it will play in this legislation. And I don't want to create an institution that will compete with EPA for the President's ear.

The other thing I would say, Mr. Chairman, is that we should consider the proper role of EPA as we look at this bill. We propose to refocus the annual report of CEQ on cutting edge issues. That's a good idea. But at the same time, we might transfer the responsibility for an annual "State of the Environment" report to EPA where there is a real interest in developing statistical indicators of environmental quality and objective measures of our press in reducing pollution.

Finally, I would commend our colleague from Idaho, Senator Symms, for the leadership he has provided with respect to assessing the environmental effects of the extraterritorial actions of our government. His legislation is now cosponsored by all of the members of our Committee which indicates not only the wisdom of his proposal, but the energy he has brought to the effort.

Senator **LAUTENBERG**. With that, I welcome you once again. We respect the fact that you each have time commitments and that you have generously agreed to be here, and I apologize for the late start.

Nevertheless, that does not soften the heart of a chairman committed to maintaining some kind of a schedule, and we will hold you to a 5-minute summary presentation. No scalding water if you go beyond 5 minutes, but we would like you to target 5 minutes. Your full text will be in the record, but we would like to hear your summary comments.

We will first call on Mr. Michael McCloskey, chairman of the Sierra Club. Welcome.

STATEMENT OF MICHAEL McCLOSKEY, CHAIRMAN, SIERRA CLUB

Mr. McCloskey. Thank you, Mr. Chairman.

I am Michael McCloskey, and I am appearing today on behalf of the Sierra Club. I will address myself primarily to the question of the recommendations of The Blueprint Project for restructuring CEQ, but I will also touch on our views with regard to your legislation and its international provisions.

I did also serve as the chairman of Project Blueprint's Working Group on the Council on Environmental Quality. That working group felt that it was more urgent than ever that the President be aided by a strong, well-staffed unit in the White House with expertise on environmental issues and that such a unit be led by an experienced senior counselor to the President.

The President cannot get the advice and the perspective that he needs on the critical environmental issues of our time just by turning to any one Federal agency or to the Domestic Policy Council. The agencies' experience is limited by their mission, and the Domestic Policy Council does not have the staff depth to grapple with the challenge.

The logic which caused CEQ to be created in the first place is more compelling than ever, but as you indicated, the Council has been permitted to atrophy over this decade. It has been shunted out of the main stream in preference to the Domestic Policy Council, and its staff has withered to about one-sixth of what is needed.

Our group believes that it is urgent that the President revive CEQ, and we hope that he will ask for the resources needed to rebuild the staff of CEQ to between 40 and 50 people, and we do hope that the Congress, too, will provide funding for this.

However, in reviving CEQ now, we do believe it is appropriate to reflect on what has been learned over the past 18 years and to restructure it so that it can be as effective as possible. In essence, we believe that CEQ needs strong, unencumbered leadership, and that it needs to focus on those things that it can uniquely do best. It needs a streamlined structure to equip the President to be able to address the critical environmental problems that are of growing concern.

When the Council was established, it was modeled on the Council of Economic Advisors, and following that pattern, three Council members were specified. But in reality, the other two Council members besides the chairman have never had a very clear or useful role. It is the chairman, and not the other two members, who relates to the President and to the White House.

The chairman is really in an awkward position if he has to convince the other two to go along to what he has worked out with the President. The chairman also needs to be in charge of the staff and not have to hold meetings to make decisions on staff direction. In reality, few meetings of a deliberative nature ever occur.

Originally, it was thought that the Council would make environmental forecasts, similar to economic forecasts. But the Council has really not been equipped to do that; thus a melding of judgments for that purpose has not been important, nor has voting for regulatory purposes been important, since CEQ's regulatory role in NEPA regulations is very narrow. Thus, we think it is time to dispense with the confusion and unnecessary expense of the other two Council members.

Our CEQ Working Group also felt that CEQ should clear the decks to focus on the most important work. We would have it focus on high-level initiatives to lay before the President to address the crises of our time: imminent changes in the global climate, the destruction of the ozone layer, the mass extinction of species in the tropics, the decimation of tropical forests, the sea of toxic chemicals enveloping us, the growth again of air pollution levels in the United States, disarray in energy policies, and heightened conflict over management of public lands.

Only CEQ can look across the contributions and the limitations of agencies to conceive of how the pieces of public policy can be put together for optimum impact. But CEQ will not have a critical mass of resources to tackle this kind of work if it is bogged down with routine work in the way it often was in the 1970s.

We recommend that a rejuvenated CEQ forget attempting to undertake original research, to reach out to undertake public education, and to dc reports on a wide range of issues. We think it should let agencies such as EPA chart the status and the trends of levels of pollution and degradation, and we think CEQ should not put over half of its energies into publishing voluminous annual reports. Other think tanks today assess the state of national, state, and world environments.

CEQ's annual reports should focus on identifying new problems, gaps in programs, failures and inadequate performance, and remedies—new initiatives needed to achieve better environmental quality. In essence, we think the President should see CEQ as his key environmental staff in the White House, not as an alien appendage. In this way, CEQ can play a valued and influential role in shaping Presidential policy.

The measure which you and other Senators have just introduced picks up the spirit of our report on CEQ in its provision which would give a new focus to the requirement for an annual report. It would replace the existing wording with a directive that the report identify new and emerging issues and various ways to deal with problems, strategies, initiatives, and priorities. We support this change. It is very similar to our recommendation.

We also support and commend the other procedural changes suggested in your bill, which would call for consulting with the public prior to preparing an environmental impact statement and which called for more attention to mitigation measures.

One of the most significant provisions of your bill deals with the international dimensions of NEPA. We think it is time to spell out the international scope of NEPA more clearly. We think it is particularly important that the question of extraterritoriality be covered, and you do that very clearly. We think it should be made crystal clear that EISs must be prepared on major Federal actions of the United States which occur beyond our borders. You have certain exceptions. We agree with many of them, though we think the one on military bases is overly broad.

Because of the limitations of time, I will just wrap up by saying that we think the wording of NEPA's extraterritorial application ought to make it clear that it applies to any material contribution which a U.S. agency makes to a major action significantly affecting the environment, and that in those cases there ought to be an assessment of environmental impacts.

Your bill does not squarely say that. It leaves unclear how to regard those actions occurring in other countries and in international commons where the U.S. Government is merely a significant contributor to the result and not the sole actor.

Senator LAUTENBERG. Mr. McCloskey, are you about finished?

Mr. McCLOSKEY. I am just winding up.

Senator LAUTENBERG. Your full testimony will appear in the record. If you have a couple of words left, OK, otherwise, we would ask you please to forgo the verbal presentation. I promise we will diligently review the material that you have submitted.

Mr. McCLOSKEY. Yes. I would just conclude by saying that we think, with that wider application, that it ought to be made clear that, particularly in the cases of MDBs, the World Bank, et cetera, the United States ought to demand that they prepare the basic material for an environmental assessment and that, absent that, the United States ought to be barred from voting on those particular loan applications.

This would go further than the bill by Senator Symms and others and would squarely address the question of our participation in MDBs.

Thank you.

Senator LAUTENBERG. Thank you very much. I am sorry to cut you off.

Mr. Robinson of Pace University. It is nice to have you here. I was once a graduation speaker at Pace. I have a fondness for your institution, and I am pleased to have you here.

STATEMENT OF NICHOLAS A. ROBINSON, PROFESSOR OF LAW, PACE UNIVERSITY SCHOOL OF LAW, CENTER FOR ENVIRONMENTAL LEGAL STUDIES

Mr. ROBINSON. I am very pleased to be here, Mr. Chairman, and although I come from, perhaps, in your perspective, the wrong side of the Hudson, I have been a great admirer of yours, and I am very pleased to be testifying before you.

Senator LAUTENBERG. There is only one side of the Hudson. That is the west and the east.

Mr. ROBINSON. I have submitted written testimony, and I will only highlight a couple of points in it and add a couple of things that are not in it.

I welcome this subcommittee's examination of NEPA and the two bills. I would point out in preface that although I agree with much of what Mr. McCloskey has said, the Council on Environmental Quality, CEQ, does have a well-known identity; it has a symbolic significance. It should continue as a Council.

In addition to having one chairman, I think it ought to have an advisory council of four or five preeminent national figures in economy and environmental sciences, environmental engineering, environmental law, economics, and so on, to assist the chairman. These could be part-time people and should be if we want nationally preeminent ones. So we keep the idea of a council.

I agree with you, Mr. Chairman, that NEPA is a huge success. Few have reported upon the good news of NEPA, that NEPA is a success, because the good news is often left to the side and we talk about the bad news. The fact that Congress in 1969 dreamed up a systemwide reform for the entire Government and that it is now largely in place is a tremendously important success story.

Even more so is the fact that some 35 other legislatures—half the States almost in the United States and a number of foreign countries and the legislatures of the provinces and states in Canada and Australia—have adopted their own version of NEPA. This is to me a tremendous flattery of this Congress. Imitation is the best flattery, and they saw a good thing. They wanted the same systemwide reforms for their countries. Even the Parliament in the USSR, which has now been reconstituted, will have submitted before it a fundamental law patterned on NEPA, which is in draft as we testify here today, in Moscow.

I have in my testimony quoted the Assistant Secretary of the Army, Mr. Doyle, who paid tribute to NEPA and the Army's use of it today. I have also quoted former Acting Secretary of State Warren Christopher to the same effect, that it has been useful in the foreign policy of the State Department in the context of the Panama Canal treaties.

NEPA operations are no longer controversial in the main domestically in this country and in the other countries where they have been instituted. In 1986, the last year for which I have seen CEQ annual report statistics, there were 521 EISs filed. Only 18 were contested in the courts, only five new significant appellate court rulings on a NEPA matter came down, and there were some 37 suits nationwide claiming that agencies should have done environmental impact statements when they did not. This is a negligible amount of litigation under NEPA.

The Canadians come into our courts to see that trans-boundary effects of NEPA are properly recognized and participate in administrative proceedings before our agencies. It has been a very successful law.

Those who criticize or discount the environmental impact statement process are invariably people who have never done an EIS or participated under CEQ's 1978 regulations in doing an EIS. The critics lack experience in the process, but somehow they know what it is all about.

The specter is what worries them, the specter that goes back to 1970 in which some people feared that a NEPA lawsuit would shut down an action of an agency or delay it interminably. That specter simply is not happening, and those who would throw up a smokescreen by saying that it is happening and therefore don't force it on us, are people who simply do not want to do the work to study the environmental impacts and avoid the adverse effects.

There is, if you will, a desire to kill the messenger so that you don't have to hear the message. This has happened in the Bush administration. Bruce Blanchard—and I have indicated this in my testimony as well—was removed from his position in the Interior

Department for doing straight EISs. They simply did not want to hear what he had to say.

I should point out that the purpose of NEPA has been changed by your two coordinated branches of government in two respects, first by the Supreme Court and the other by the executive order which you, yourself, have described. When Congress in 1969 said that all agencies of the Federal Government, to the fullest extent possible, are to undertake the environmental impact statement process, there was not an exclusion for a given agency or a given type of action.

The courts took this quite seriously and read the purposes of NEPA in section 101 with this section 102 EIS process. The courts implemented it rigorously and developed something called the hard-look doctrine. The hard-look doctrine was rejected by the United States Supreme Court in a line of four cases: first, the *Vermont Yankee* case in 1978; *Stryckers Bay* in 1980; and last month two cases, *Robertson* v. *Methow Valley Citizens Council* and *Marsh* v. *Oregon Natural Resources Council.*

The Supreme Court basically has said:

> Assemble all your information, make sure it is in the document, but don't worry, you don't have to follow it. That is your decision. Only if it is so clearly arbitrary and capricious that you should have done a little environmental protection will we reverse you.

I have laid out in my testimony an analysis of those cases, and I think it is essential not only, in your bill to include the mitigation language, which I heartily support, but also to reinstruct the courts to follow the hard-look doctrine.

The hard-look doctrine is clearly understood in the law review literature. Professor Davis, our Nation's preeminent writer on administrative law, criticized the Supreme Court for dropping the hard-look doctrine. The hard-look doctrine would in fact assure that agencies do look at mitigation and do look at the cumulative impacts that you wish them to do so.

The second erosion of congressional intent in 1969 was Executive Order 12114. I do not think there is any authority for selectively deleting any of the foreign affairs agencies or any of their actions. It is clear that extraterritoriality can be dealt with constructively. This Congress did so in the Freedom of Information Act, when you put in place a very clear process to safeguard national security interests, to safeguard military matters and, at the same time, give the people of this country—or, for that matter, any country—access to government, where secrets are not really needed. I commend to you the formula that you have already designed and tested and negotiated out with the Executive Branch, and has been vindicated in the courts, on dealing with extraterritoriality in this context.

I would also point out to you that there are those who say, if we allow extraterritoriality, there will be a floodgate of litigation. Well, first, that simply has not happened under NEPA. Second, it has not happened under the formula of the Freedom of Information Act which is in place. Third, I think if you ask any bar association in this country to respond to the question of would that result in excessive litigation that would tie up the country, the bar associations will say no.

Liberalized standing to sue has been in place now for some 20 years, and when liberalized standing began, both in *Sierra Club* v. *Morton*, and then when this Congress put in place the citizens suit provisions of practically every environmental law, we have not seen a floodgate of litigation, even though in those citizens suit provisions, clearly, broad liberalized standing is institutionalized.

Those who would oppose extraterritoriality for fear of litigation are simply putting before you a parade of horrors which is simply a parade of phantoms. It is not a serious problem.

Senator Lautenberg. Mr. Robinson, are you ready to wrap up?

Mr. ROBINSON. Yes, I shall, sir. I appreciate your patience.

I have testified last year in support of an earlier version of Senate 1045 and commend that testimony to you.[1] It is clear that this administration can take environmental leadership for this country. It is clear to me that Congress must take it first. I support both of these bills strongly.

Senator LAUTENBERG. Thank you very much.

I was interested in your comments, each of you, in terms of the structure of the CEQ, and we are going to hear from the present chairman shortly.

I, too, am concerned, Mr. McCloskey, that if you pick a chairman and he in fact becomes the Administrator—similar, let's say, to EPA—we are talking about a policy-creating or recommending group. Aren't you concerned that the selection of the wrong individual there—because we know that you get varying views of the environmental responsibility depending on who the occupant of the White House is—aren't you concerned that, therefore, if you have a choice of one, that the possibility of having someone who does not have either the background or the understanding of what conditions would make this agency or this function somewhat less effective?

Mr. MCCLOSKEY. Mr. Chairman, that issue was debated long and hard by our working group, which, as I said, represented largely people who, over the last 20 years, have worked for CEQ or been members. One of them was the chairman of CEQ.

The critical factor that emerged in our discussion of these problems was the choice of whether CEQ really is viewed as an integral part of the White House—part of the confidential staff of the President—and has some influence on what actually he does and he recommends to the Congress.

I think the dominant view was that you can go one of two ways. It can be viewed as more independent and have a constituency and a variety of views, or it can be closely linked to the White House. When it is more independent, I suppose that under model it would be more appropriate to have diverse views, but the dominant view—and I bought this—was that it really only will have impact if it is close to the President, it is really integrated into the White House, and that will turn on this relationship between the chairman and the President and his chief advisors there, and that a group process from CEQ's end does not seem to work very well.

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[1] See Senate hearing 100-679, before the Subcommittee on Hazardous Wastes and Toxic Substances of the Committee on Environment and Public Works, June 16, 1988, at pages 32, 93, and 115.

Senator **Lautenberg**. Well, we heard Mr. Robinson's recommendation of perhaps a chairman with an advisory body. I am concerned that the community won't be represented, or environmental groups won't be represented. We might get someone appointed whose views coincide with the President's.

I cannot imagine a President appointing a budget director who is going to say, "Hey, listen, we have to spend more money and stop the lip-reading." It is not likely to take place. It is a point where we have put our recommendation in there, and we support the consolidation, but I wanted to explore that with you.

I wanted to ask you, the CEQ regulations implementing NEPA require that impact statements consider reasonably foreseeable environmental effects. Is there any question that global climate change and stratospheric ozone depletion are reasonable, foreseeable effects based on certain Federal actions? Is there any doubt that we can forecast the effects of decisions that we make here?

Mr. **McCloskey**. Not in my mind. I think there is enough scientific literature now to do a lot of analysis about the impact of various actions of our government.

Senator **Lautenberg**. Do you have any questions about that, Mr. Robinson?

Mr. **Robinson**. I think the effects are there, and that is why all these meetings in Europe that the Bush administration is attending are being held. I think the Intergovernmental Panel on Climate Change knows there is something happening.

I think what we have to do now is have experience with the analysis. If we don't start doing analysis about why these effects are taking place, we will not know, and every time you do an EIS, you are doing that deliberative analysis to try to figure out the cause-effect relationship. You may not be able to change the effect through any small action, but you should be doing the analysis.

Senator **Lautenberg**. But it is usually in a narrower framework. I mean, we are talking about the impact on nearby water supply; we are talking about the impact on nearby residents or inhabitants. We are not talking about the broader scope of things, the change that takes place over decades, perhaps.

Mr. **Robinson**. But if we began to identify the shifts away, for instance, from carbon-dioxide-producing activities, where we have that option—every scientist I have spoken to says we need to do every little bit to deal with global warming, and if you don't start doing it incrementally, you are continuing the patterns of incremental deterioration.

NEPA's success is that it eliminates this incremental destruction of the environment by forcing an examination of the small things you can do without stopping projects in their design.

Senator **Lautenberg**. All right. So we certainly have a reasonable basis for making these decisions or coming to these conclusions.

Shouldn't the environmental impact statements on energy, transportation, forest management practices, other Federal programs address these problems?

Mr. **Robinson**. I believe they should, but they do not right now because of the two effects that I have described.

Senator **Lautenberg**. But they should.

Mr. **Robinson**. If the courts are not going to require the use of mitigation measures, no one is going to study the mitigation measures seriously, and your bills go a great way toward remedying that. I would just urge that you reinstate the hard-look doctrine or, frankly, a skillful writer of an EIS can examine these things and then go ahead and do nothing about them, which I don't think is what we are here about today.

Senator **Lautenberg**. Absolutely.

What do you think of the decision of the former Secretary of Transportation, when he said that he chose not to prepare an EIS when he decided to lower the CAFE standards? What do you think of that decision? Is that contrary to what we are looking for?

Mr. **Robinson**. I think, clearly, the CAFE standards are directly related to the small types of actions that government can take without disrupting the economy to improve our trends. I have analyzed the CAFE standard cases in the testimony, and in my view, had they done an EIS which required mitigation, there would have been a different result.

Circuit Judge Ginsberg, in her rejection of the suits by California and New York and the City of Los Angeles against the CAFE standard erosion earlier, had said in effect that it is a close question, so I am going to let the bureaucrats do what they want to do; I can't interfere in their affairs. That is what right now fails to motivate the officials in our government to look at those issues. They can right now evade NEPA successfully.

Senator **Lautenberg**. Mr. McCloskey, do you have a view on the Secretary's decision?

Mr. **McCloskey**. Well, I certainly do. I think that that is a prime example of just the kind of actions that ought to be subject to an EIS. The result of that is, among other things, more smog, worsened air quality, more coal mined, more CO_2 in the atmosphere.

Senator **Lautenberg**. That to me is almost a classic example of what at least ought to be considered before what amounts to a major decision like that.

CEQ proposed to issue guidelines to Federal agencies to address these issues in their EISs, but obviously, this guidance was quashed by the Reagan administration. No action has been yet taken by the Bush administration. What does this failure to act say about our commitment to deal with these issues? It says they are important in the final analysis. Then you would both agree that the administration ought to get on with the task of issuing these guidelines?

Mr. **McCloskey**. Absolutely.

Mr. **Robinson**. It would be very useful.

Senator **Lautenberg**. The Senate Energy Committee's ANWR legislation makes a legislative finding that the Department of the Interior's impact statement on drilling in ANWR is adequate. What do you think about Congress making determinations about the adequacy of impact statements?

Mr. **Robinson**. Well, Mr. Chairman, Congress has the power to do so, but it is a little bit like the religious authorities telling Galileo that his observations of astronomy are not factual.

Senator **Lautenberg**. That is flattering to the Congress. I am delighted to hear you say that.

Mr. **Robinson**. Yes. The EIS process is premised on a factual study and an environmental impact analysis, and that process has to go forward unfettered. I think when we saw that process cut off with the decision to end the analysis of the Alaska pipeline environmental impact studies, we failed to build in mitigation measures that might have averted the *Exxon Valdez* tragedy.

When the 1973 Trans-Alaska Pipeline Authorization Act, Public Law 93-153, was passed, they said, Oh, well, don't worry, we'll create strict liability for the vessels, and we will create a $100 million fund, and everyone will have to pay. Well, if they had put in simple mitigation measures like requiring the pilot to get the boat further out into open seas, we might have been able to avert the tragedy at much less cost.

I think it is important to let the environmental impact statement process play out to its full analysis and not arbitrarily cut it off, which such a piece of legislation on ANWR would do.

Senator **Lautenberg**. So Congress' role in making determinations about the adequacy of impact statements, you think, is one that ought to be aggressively pursued?

Mr. **Robinson**. I think Congress basically should let a full factual analysis play out.

Senator **Lautenberg**. Well, then we run into the problem, and that is, is Congress micromanaging these policy decisions? I think, when there is failure to achieve the goal, then Congress has to backstop these things, and if we do not learn from our experiences, then we are playing the ostrich role.

So you would want to, however, oppose the provision that provides for Congress making the decisions on the impact statements?

Mr. **Robinson**. I think the permitting agencies need to do the EIS, because they are going to be ones who have to follow up with the mitigation and make sure that the protection is really there in the long run.

Senator **Lautenberg**. Do you feel that way, Mr. McCloskey?

Mr. **McCloskey**. I do, indeed. I think it is a confusion of roles for Congress to intervene once it passes a law like NEPA that asks the agencies to do them, and the whole purpose is that the agencies need to be informed by the process of their discovering these facts and coming to conclusions about them, and if Congress starts to intervene one way or the other, it relieves, in effect, the Executive Branch agencies of those responsibilities.

Senator **Lautenberg**. In short form, both of you are long-time observers of NEPA. Again, in short form, what do you think are CEQ's primary responsibilities?

Mr. **McCloskey**. I think CEQ's primary responsibility should be to advise the President on new policy, to find what the most pressing needs are that are not being adequately met, and to devise constructive solutions that can be either implemented administratively or may involve new legislation. That is the essence of our recommendation.

Senator **Lautenberg**. Mr. Robinson.

Mr. **Robinson**. I would vary that only slightly. Knowledge is power, and the genius of Congress in establishing NEPA was to place in the White House a very knowledgeable unit and then, through the EIS process, place in every Federal agency a group of people who were to ferret out the facts and establish the knowledgeable base to make informed decisions.

What has happened during the Reagan administration is that they cut themselves off from the knowledge—Lindsey Grant, a former Assistant Secretary of State, urged that all of these environmental trends be focused on and brought into the White House so that they spread out a broad net throughout all of the Federal agencies and collected data to make informed policies.

The White House right now is parochial and, indeed, has closed doors. It does not want to know what is going on in all of the agencies. And, indeed, one chairman, as you point out, cannot play this function alone. He is only an expert in what he knows. Anyone today needs a body of experts to do that.

What CEQ really needs to do is to keep—I agree with Mr. McCloskey—keep that information coming in to the President, and we have to have a formula so that it cannot be ignored; and, second, we have to keep the EIS process strong in each of the agencies. Even throughout the last 8 years, CEQ has been, I think, quite effective in keeping the NEPA process going among the Federal agencies, keeping the NEPA regs in place, and keeping environmental impact statements a stable regulatory framework.

Senator **Lautenberg**. But its function, as I hear each of you, is advisory, principally. Mr. McCloskey, you said that you felt that CEQ's function was, perhaps, to serve the development of legislation. That is hardly what we are looking at. This, in my view, is not what CEQ was created for initially. It was to advise the President.

Now, that assumes that the President is one who is going to be concerned with the effects on the environment of decisions that are being made or programs that are being put in place by the various agencies.

I think we are fortunate that we have a fellow like Bill Reilly as the EPA Administrator. We know that someone who has his kind of credentials has not been appointed in the past. Make that appointment based purely on political help, and what do you have? You do not have someone who is advising, they are not going to be here proposing legislative direction.

So again, I do not want to dwell too long on this, but I think defining or maybe redefining CEQ's role is something that perhaps ought to be further reviewed.

Mr. **McCloskey**. The essence again, I think, of the problem is whether it is supposed to be part of the White House as an integral part of it. If it is, and the President is not interested in the environment, clearly, it is not going to have much of an impact because the climate is inhospitable. But if it is sort of an appendage at a few lengths removed, I think it was our feeling that if the President basically is not hospitable, it is going to have even less effect then, and it is not going to develop a real constituency for independent action, either.

We think there is no halfway house, that it either ought to be a real integral part or ought to be really independent, but to kind of have it in the middle, we think, will not result in much of value.

Senator **Lautenberg**. Certainly, there is cause to review this very carefully.

Administrator Reilly testified before this committee that CEQ needed additional resources. There is no disagreement about that, is there?

Mr. **Robinson**. No.

Mr. **McCloskey**. Not at all.

Senator **Lautenberg**. Not with me, either.

Considering Senator Symms' bill, can U.S. actions abroad have significant environmental effects? Do you think so?

Mr. **McCloskey**. Oh, absolutely. An example would be AID's work in a country like Sudan where it is having a major effect on forestry programs and agriculture programs; or the Bureau of Reclamation and its contributions to the Three Gorges Dam proposal in China. It can have very significant impacts. And, of course, our contribution in the World Bank's decisions on loans to Brazil and the Amazon. The Power Sector II loan, for instance, is probably the most significant thing in terms of its impact of any of these overseas decisions.

Mr. **Robinson**. One of the curious things about this debate is that practically every donor nation has now enacted an environmental impact assessment law as part of its domestic regime for decisionmaking. Most recipient nations have voted for the UNEP proposal that in fact all nations try to do EIA.

Everyone says it is a nice thing to protect the environment, and yet we find people resisting doing the extra work to do the actual protection, to do this up-front study. They would rather spend lots of money on the project after the fact when it has to be repaired for the environmental damage.

We will have in the next 10 years a billion new people born into the world, and the environmental activities to help these people are potentially going to have major impacts.

Senator **Lautenberg**. When NEPA was first enacted, the Federal agencies complained that implementing the NEPA policy would adversely affect their programs. Do you see any similarity between those complaints back in the early seventies and the complaints we are hearing now from Federal agencies about applying NEPA to extraterritorial effects?

Mr. **Robinson**. Most of the complaints are almost identical.

I was privileged to participate in a conference at West Point of the managers of most Federal agencies and most States that have their environmental assessment laws. The consensus of that conference was that EISs actually saved agencies money and streamlined and made more effective their decisionmaking. So the very agencies that originally opposed it, 20 years later, have now come to praise it. I have made a copy of the proceedings of that conference available to the subcommittee.

It seems to me that if the foreign affairs agencies would get their feet wet and do some of these environmental impact statements, they would find out how useful the process could be.

Mr. **McCloskey**. The only thing that is somewhat different in some cases with regard to the argument of burdensomeness is how many of the facts are in our hands versus the hands of some other entity or agency, as in the case of the World Bank, where the facts may be more easily reached by them and the borrower countries. But we think the cure is an easy one, that we only participate and make our contribution if those other entities do some sort of substantive environmental assessment to inform our participation in the decisionmaking.

Senator **LAUTENBERG**. There is some concern by some of our agencies that applying NEPA to Federal actions with extraterritorial effects might impose U.S. views on other countries and affect our foreign policy. Do you agree with that?

Mr. **ROBINSON**. I think that is so out of touch with the reaction, for instance in Western Europe to President Bush's address yesterday, which you have mentioned, that it is one more straw man or make-weight to oppose doing the environmental studies.

The third world has too many problems to want to have mistaken development take place. It does no good to build a modern hotel on the edge of Africa which is going to fall into the sea, and several have.

Senator **LAUTENBERG**. I was struck by the President's decision to make that an integral part of that address and the response to it.

What do you think about requiring U.S. representatives to multilateral banks to abstain on projects which do not comply with the environmental assessment requirements which would be established pursuant to Senator Symms' bill?

Mr. **MCCLOSKEY**. Well, we, as I have indicated in my testimony, think that that is what ought to be the requirement, that if the assessment is not forthcoming, we abstain. We really do not think that an institution such as the World Bank or the other MDBs will want to see the United States permanently abstaining if they fail to do this, or lose interest in those programs.

I think that is, however, one of the defects of Senator Symms' bill, that it does not provide that remedy. It requires the United States to ask for the assessments. It directs us to negotiate to get them but then, failing to get them, provides no remedy. It just acquiesces in the status quo if we get nowhere.

Senator **LAUTENBERG**. We thank you both for your testimony and would ask, since the record will be kept open for a while, if questions are submitted to you in writing, that you respond promptly.

We thank you for being with us today.

Mr. **MCCLOSKEY**. Thank you, sir.

Senator **LAUTENBERG**. Next we have Mr. Hill, and I would suggest at this point, Mr. Hill, that we recess for a few minutes while I go to the floor to vote. The committee is in recess for 10 minutes.

Thank you.

[Short recess taken.]

Senator **LAUTENBERG**. We will reconvene the committee.

Mr. Hill, we are pleased to have you with us. We invite you to give your testimony and under the same general constraint, and that is, whatever summarization you can do, we would appreciate, and we will watch the clock but not too carefully. This red light does not mean the same as it does out in the street, it doesn't mean stop, it means speed up.

STATEMENT OF HON. A. ALAN HILL, CHAIRMAN, COUNCIL ON ENVIRONMENTAL QUALITY, ACCOMPANIED BY DINAH BEAR, GENERAL COUNSEL

Mr. HILL. Thank you, Mr. Chairman.

I would like to introduce Dinah Bear, the General Counsel of the Council on Environmental Quality, whom I asked to sit with me because she has carefully annotated potential questions and potential answers for those questions. If I read the script properly, we will both come out of this quite well.

I will forgo any opening statement at this time, save with the observation that it is 8 years ago this month I sat at this table for my confirmation hearing. I view this as an auspicious time to be leaving my office, which I will at the end of the month.

Let me say that today in my answers I will be as responsive as possible to that request that was made of me and the commitment I made 8 years ago to fully and faithfully respond to requests of congressional committees to appear and to be straightforward in my answers.

Senator LAUTENBERG. We thank you for your service to the country.

As you have already heard and as you know, when you take a position here, there are some rewards, sometimes hard to find, considerable risks, and what you heard thus far reflects a concern about the quality of the work done by the CEQ and what the scope of its responsibilities are. So our questions should not reflect a bias but rather a concern about how we deal with these problems. We appreciate whatever you can say directly, candidly, and you have pledged that, so we will hold you to do.

Why did the Council decide to look at the issue of having environmental impact statements address global warming and ozone depletion?

Mr. HILL. Mr. Chairman, many individuals, groups, et cetera, were very concerned about that question. I must say the spur to act and act as expeditiously as possible probably came when I received a letter from members of this subcommittee and the full committee. As I recall, you were one of the authors, signers, of that letter, which indicated that we should get on with it.

We did get off to a slow start, but I think we did a responsible job in holding a series of public meetings at which scientific experts came before the Council. We held these in the sunshine, which the Council must do when it meets together as a Council, and found at the end of that process that we crossed the line between mere speculation about something, and we crossed the line to where the reasonable man theory or reasonable woman theory, a reasonable person, believes we must start to pay much closer attention.

We also found in that process that very, very few Federal agencies had considered any of the many questions covered by the general title, global change or global climate change. Very few agencies had even considered that in any EIS, the classic being when we were thinking about the SST. That is when it did come up, and what the SST would do to the upper atmosphere, especially the ozone layer.

Senator **Lautenberg**. Why didn't the administration under which you were appointed proceed with guidelines?

Mr. **Hill**. We had a series of fairly heated meetings and conversations—I did—with the Cabinet Secretary. The feeling at that time was, there were 5 or 6 days left in the Reagan Administration, and the feeling was—and I agreed—that the incoming administration should have an opportunity to review the guidance that the Council had prepared, the guidance to go to Federal agencies, before it went out for interagency review.

Senator **Lautenberg**. Do you know what the current administration's position is on the guidelines?

Mr. **Hill**. I have had a multitude of meetings with various people on the White House staff with regard to this. The request to me—and I have said we should be getting this out for interagency review; it does not commit you to a course of action right now, but we should benefit from the agencies' review. The reason this all came to the White House in the first place was that we had sent it to the Justice Department and they found a couple of errors in what we were proposing to do in terms of retroactivity of EIS', and we had not put in that disclaimer that says, OK, the new guidance applies for any EIS' started from now into the future; and the concern was that there would be litigation on old, already completed EIS'.

So I knew at that point, as we have always done with anything that comes from the Council, we do send it for interagency review because we get a better product back out of it. So that has been our point of discussion.

Now, in March I was asked to hold off pending the development of a comprehensive policy review by the President through the Domestic Policy Council mechanism of the general question of global change or global climate change, not just one individual piece. Unfortunately, those discussions have not been concluded as yet. As a consequence, I withheld from sending draft guidance out for interagency review until that takes place.

I do know, if I may just interject, I do know, as a result of our public meetings, the final one of those, we had the EIS experts in the departments come before us and list off their difficulties in dealing with these questions, and they urged the adoption of guidance to serve as a common framework through which all agencies would face these questions.

I, myself, personally feel that I can see no reason why it should not go out for interagency review. I believe it is needed.

Senator **Lautenberg**. Has there been any effort by the administration to proceed with guidelines at this point?

Mr. **Hill**. I know of two individuals who have read them; that is all.

Senator **Lautenberg**. Have the guidelines gone out for interagency review?

Mr. **Hill**. No, they have not.

Senator **Lautenberg**. You said earlier, and I think we conclude—I just want to be sure—are Federal agencies now addressing the global warming and ozone depletion in their EIS statements?

Mr. **Hill**. The performance is extremely spotty. I can give you—the one I know of on the topic of sea-level rise was the EIS done on moving Cape Hatteras lighthouse back from the shore. That is one very specific example.

On greenhouse effect, we know of none. On ozone depletion, there are two or three that have been done; that is all. And it is not only just the topics here but the point that came up with the earlier witnesses, and that is looking at cumulative effect as well.

Senator LAUTENBERG. I appreciate the forthrightness of your statements and wonder if I could ask you to provide draft guidance for the committee for the hearing record.

Mr. HILL. Yes (See p. 108).

Senator LAUTENBERG. I asked the first panel about a provision in the Energy Committee's ANWR legislation making a congressional determination that the impact statement prepared on this project is adequate. Without addressing the merits of the particular case, do you think it is a good idea for Congress to be making such determinations?

Mr. HILL. I would never challenge the Congress' right or ability to do such. I would say that you are——

Senator LAUTENBERG. All right. Do you think it is a good idea?

Mr. HILL. You are asking for an unbelievable workload if you start to get into that topic area. I feel confident that the procedures that are in place now provide a considerable opportunity for the public to be involved. The public is involved at the scoping level on an EIS; it is involved at the draft EIS level; it can be involved through EPA. The EPA staff very clearly reviews and rates all draft EIS'. So we have all those procedural protections already in for public participation.

And finally, any citizen has the right to bring litigation on the adequacy of the EIS. So we have all those things. I think Congress is asking for an unbelievably massive workload, and I don't know whether you like to have night meetings of this subcommittee or others. I would not if I were you.

Senator LAUTENBERG. Well, for the pay, it is worth working nights.

I wanted to ask you this, then. Based on the statements you made about the lack of circulation of requests, the lack of effort, how do we assure ourselves that we are doing the proper job if we don't get involved? I mean, the worst thing, as you know, that one can do, at least in my view, and that is to stand aside when you see something wrong and say nothing about it.

Sometimes we are powerless to solve the problem unless we say, OK, this is the way it is going to be. I mean, we have had that with other environmental legislation. When we were in Superfund, there was a question about whether or not we ought to put time limits, number of starts, definition of clean, all those things. We decided to do it because it had not been done in the first iteration of Superfund. So sometimes Congress has to get involved in these things.

Mr. HILL. There are those situations, Mr. Chairman, that will be exception to what I just—the caveat I tried to offer you. That I understand very clearly.

Senator LAUTENBERG. Would you be willing to give us your personal views on what needs to be done to strengthen CEQ? You did this because you felt it was the right thing to do, and you stuck with it through some, I think, tough days, to watch something that you have responsibility for, each one of us. I don't care what the motivation is—political, financial, or otherwise—there are very few people on this Earth of ours who do not want to do the right thing.

So what should we do to strengthen CEQ? Don't we need additional resources? Should we change the structure? If so, how? Should we make changes to their mission?

Mr. **Hill**. There are many, some of which are touched upon in the legislation before your subcommittee. There are other changes that I, personally, believe need to be made, and I am very impressed with and supportive of the basic outline of the concepts included in The blueprint for the environment document.

I think the first thing—and the legislation does touch on this—is granting statutory authority to the Council to promulgate regulations. Now, the regulations guiding the NEPA process for our Government are solely based on an authorization from an executive order, and those are always subject to challenge.

Second, make that requirement inclusive of all agencies. The Council—and I have visited with all former chairmen and many former members on a fairly regular basis— the Council had a long-running battle with the Federal Energy Regulatory Commission on adoption of NEPA procedures. That had good days and bad days, and until Chairman Hessey took office, nothing really got off dead center. When she came, she said, We are going to adopt procedures voluntarily; we are not waiving our belief that we are independent of that. But she did that job, and FERC now has those procedures in place. With a statutory authorization, it would make the job easier.

As to changing the Council, if I may take a minute to give you a perspective—it is mine; I believe there are other former chairmen and members of the Council that would agree—the Council was modeled after the Council of Economic Advisors, as you have heard. One of the things the authors of the legislation missed was the fact that in 1953 President Eisenhower, by reorganization authority, changed the role of the members of the Council. The reorganization order transferred the authority of the Council to the chairman and just left the members there.

When you are in a collegial body, the potential for voting on every single thing is always there. It depends on the good will of the three members. We have had a Federal court decision that says that the Council may not meet privately. It must always meet in the sunshine.

Then comes the command from the statute that the Council, or the chairman, formulate policy advice to the President. I think holding policy discussions and discussion options in the sunshine has a chilling effect, if that is the term of art, on a free interchange, not that the public should not know, but the President should be free to get the best advice possible and make his decision based on that advice.

So you have that situation that exists there. The potential is there all the time. Having talked with former chairmen when I first came, I decided that the Council would not, as Council, enter into those discussions. As a consequence, my colleagues felt that they were being left out of the process, so you have hurt feelings or the potential for hurt feelings there.

When we are in discussion on budget levels with OMB, I don't think those conversations necessarily have to take place in the public. We have always participated together on referral questions and the one time we amended the regulations. So there is that change.

Now, my feeling is that what you do is you eliminate the members as full-time members. You expand the number; it could be four, five, seven, whatever. There is a third and far more practical need to do that under the current budget situation. On a budget which includes a personnel cost and benefit number of $660,000, if you have three members, two of which cost $82,500 and one costs $89,500, that is a very big chunk.

Senator LAUTENBERG. Almost half, about 40 percent.

Mr. HILL. Yes. I did some back-of the-envelope figuring and said, OK, we would have four members; they would meet four times a year for a couple, 3 days; they would be paid for those days, their transportation, room and board, et cetera; and I could see a savings of potentially $140,000 or $150,000 on the existing PC&B number.

Now, that means an additional three staffers, at least. So there is a real impact on the resources available there within the current number. Now, if there is relief on that number, things can change. But it is another compelling reason.

So those are things that I see. Now, there are others in the role of coordinating among the agencies, which I think we have had some success in over the years, that could be strengthened, and those types of things.

Senator LAUTENBERG. Mr. Hill, the Council conducted a survey of Federal actions under Executive Order 12114 dealing with the environmental effects abroad of major Federal actions. How often are Federal agencies implementing that executive order?

Mr. HILL. Not many. Now, you had the 45 figure. In preparing for this hearing, there is another number of environmental documents in the range of about 200 per year prepared by EPA, but those go to the prevention of significant deterioration permits that EPA issues. So it is about 245 in the 1985–87 range. Certainly it is a very small number. Seven agencies basically are part of this process.

Now, there is another reason for part of this that I must stress, and that is, the executive order does not cover those actions that a Federal agency is taking outside our borders which is done in cooperation with the host government. So if it is a cooperative effort, that is excluded from the process. We have no way of knowing. We feel that it limits the coverage of the executive order substantially.

Senator LAUTENBERG. So, does that suggest that there are too many loopholes in the order, too many unanswered questions about jurisdiction, that kind of thing?

Mr. HILL. I was not involved in the discussions leading to the issuance of the executive order. Those that were at the Council at the time and were deeply involved said that was one of the most bloody, difficult battles that ever went on, and the first advice I had from all of these—and this was back 8 years ago—was don't get into that unless you want to be in a very painful process.

Senator **Lautenberg**. You said that you served in this capacity 8 years, glad to have done it. Implicit, I think, in what you said—I don't want to read anything—it sounded like it was an 8-year term that you are planning to continue if requested to do so?

Mr. **Hill**. No.

Senator **Lautenberg**. All right. I just wanted to be sure.

Mr. **Hill**. I told them I am going home the 30th of June, and Mrs. Hill expects me home the 30th of June, also.

Senator **Lautenberg**. Well, then, therefore, the admonition that you got from previous people about don't get into that has little significance any more. You want to leave with as much of an impact as you can, and to say that not only did Alan Hill serve well, but he also left an imprint that wants to make it even better.

So, therefore, are there too many loopholes in the executive order, do you think?

Mr. **Hill**. Well, personally, I feel that there is some tightening that could be done.

Senator **Lautenberg**. Does the order provide sufficiently for public participation?

Mr. **Hill**. The order is silent on public participation. My understanding is that there is no prohibition in the order for public participation. As a matter of fact, the Department of the Army has specifically said, when individuals request the opportunity to review, comment, as long as it is not a security matter, that they will do that. So the Army stands a little taller in my book for going that extra step.

Senator **Lautenberg**. As a result of a lawsuit, AID prepared regulations implementing NEPA. These regulations identify classes of actions which normally have a significant effect on the environment, provide for public participation in the EIS process. If AID can implement NEPA for its projects abroad, why can't other Federal agencies?

Mr. **Hill**. I have not asked the other agencies.

Senator **Lautenberg**. Can you think of any reason? Can Council think of any reason why they cannot?

Mr. **Hill**. I will assume, as I do quite often—and I sometimes have gotten in trouble for it—but it is like the resistance of Federal agencies initially to the NEPA process. It is an unknown, it is new, it is not doing business the old way. It may be threatening to our program. There is that whole litany of reasons that immediately come to mind.

I think those agencies of the Government that have gotten in and worked the process and really done a sincere, professional job of it have found they are making better decisions, they are getting better projects—in fact we have a letter from, what is it, the Pacific Command of the Army?—that says, if I can—Dinah has it here someplace—it says yes, it takes a little more time, yes, it is a little more expensive, but it is saving us money in the long run. So there is this recognition that is coming about the process.

Senator **Lautenberg**. So they can——

Mr. **Hill**. Excuse me, it was the Coast Guard.

Senator **Lautenberg**. All right. The Coast Guard always does the right thing.

I am chairman of the committee that funds Coast Guard.

So if AID has been able to do it, we see no reason why other agencies cannot, though there is no directive to do so.

Do we have emergency regulations addressed by NEPA?

Mr. HILL. Yes. We have procedures, and I can give you a couple of fairly interesting examples. The Fish and Wildlife Service came a few years back and said, We must capture the last of the condors in California that are free. The population was down to about 20 or 25. Most of them had gone already to zoos for a program to regenerate the species.

They decided an emergency existed and discussed with general counsel their reasoning to get an exemption from NEPA to go ahead and capture the condors, and it was a case of either you did that or they were going to be gone. So we granted that.

The city of Salt Lake City, Utah, came—in fact the Governor of Utah came one morning to visit with me and said, Now, we need an emergency exemption to begin pumping. It was when the Salt Lake had come up and was going over the freeway system and encroaching on the city limits of Salt Lake City. Fortunately, at that point, Senator Garn was chairman of our appropriations subcommittee in this house, and when his office calls, one generally responds in a fairly prompt basis.

Senator LAUTENBERG. On matters affecting Salt Lake City, I would say so.

Mr. HILL. So I was in a position to be able to say to the Governor, "Would you like your letter this afternoon, or do you need it this morning? Are you leaving at noon?" He was shocked at the speed with which that got done.

Senator LAUTENBERG. So we have the capacity to do it.

I will ask one last thing and recognize Senator Reid.

We have asked the multilateral banks for a number of years to take actions to integrate environmental analysis into decisionmaking and to provide the public with a role in the process.

You recently wrote to the House Merchant Marine Committee that the Interamerican Bank and the African Development Bank are not adopting environmental assessment practices. If we do not take any action, will the banks ever change their policy?

Mr. HILL. It will be a much slower process, Mr. Chairman. I must say that the interest that has been expressed by the Congress over the last five years has gotten some attention in the right places.

I have just returned from the United Nations Environmental Program Governing Council meeting in Nairobi, and while I was there, I visited with the executive director of the program and explained the situation we have with regard to the development banks and received his assurance that he will do his personal best.

Senator Symms put forward a proposal last year with which we disagreed. The changes this year have been very progressive. They are very well-thought-out changes.

I see a difficult in focusing our attention on the U.S. executive director of each of these banks. I am sympathetic to the point of view in the Treasury Department in that if we single out the U.S. executive director, that puts that individual in a difficult situation.

I have proposed, in the alternative, that we get together with the other donor nations and work out a proposal which all the executive directors then would bring in as a united front, as a way to do this. I have discussed this with officials of the OECD. There is some hesitance among the development community to do this type of thing. Again, I think it is fear of a new process, of a different process.

Now, the recipient countries are very opposed. They consider it conditionality, and we had a great debate in Nairobi that lasted several days. The last day, when the vote was held, I offered a statement on behalf of our country saying this process is important, and we asked for—I suggested that local participation in decisionmaking would be a wise idea, to which our Brazilian colleagues responded, "That is exactly right; local control. Our community says what they want, and you send it."

We have to get off this idea of we are going to support anything just for the sake of supporting. We have to go through a thoughtful process of thinking about at least the environmental impacts.

Senator **Lautenberg**. Problems that are local, and we have the responsibility to provide leadership, and I say that if things do not happen with some kind of reasonable timeframe, you take the actions necessary to protect your interests. In this case, we are talking about the interests of the inhabitants of the world.

Thank you very much, Mr. Hill.

Senator Reid, you have been patient. It is now your turn.

Senator **Reid**. Thank you, Mr. Chairman, for your consideration in including me today, though I am not a member of this subcommittee.

As you may know, there is an ongoing conflict in Nevada and other States over designation of special-use airspace. The two States that are the worst are the State of Nevada and the State of North Carolina. Many Nevadans are justly concerned at the increasing demands for airspace for military operations which, among other things, can involve low flyovers by supersonic aircraft, which can disturb the human population and ecology below.

This committee conducted two hearings on the issue in 1987 and 1988, and Congress passed legislation to address the issue but failed to complete action before adjournment, although, Mr. Chairman, we came very, very close. It was the last few minutes, literally, of that session that the conference would not agree on this provision of the bill.

I have reintroduced the legislation, S. 903, to require the FAA and DOD to comply with NEPA and provide some opportunities for public comment on special-use airspace decisions.

With that brief background, I have a few questions for Chairman Hill. First, a GAO report published last summer on this issue concluded:

> It is unclear whether FAA's proposed review changes will differ substantially from its current practice of basing its decision on aeronautical concerns and, consequently, whether this issue will require resolution by CEQ and FAA.

Have the FAA and CEQ come to terms on this issue, chiefly whether environmental concerns as well as aeronautical matters must be taken into account in granting special-use airspace?

Mr. **Hill**. No, we are not in agreement, Senator. I must say that the FAA has been one of the most difficult agencies in the Federal Government to get through to, to get them with the program. Staff in my office have expended unbelievable amounts of time talking to people who think that the National Environmental Policy Act either does not exist or should go away.

I think it is shameful the way they have performed. I have personally gone to the Administrator of FAA and tried to reason and thought we had an agreement, and then it goes back to staff and disappears in God knows what over there.

They are asking for a lot of trouble. They are not serving our country well. They are not serving the defense of our country well. I would hope the next chairman of the Council is more successful than I. It is an embarrassment to me as a citizen of our country.

Senator **Reid**. Mr. Chairman, your being in the position you are in, I hope you heard that loud and clear.

Senator **Lautenberg**. I heard it. You have not heard me disagree with it.

Senator **Reid**. In November 1987, CEQ presented testimony to the effect that the FAA is responsible for independently evaluating the scope and content of environmental documentation presented by agencies requesting special-use airspace. At this point, has the FAA acknowledged that responsibility and adopted procedures for independent evaluation of environmental assessments and impact statements?

Mr. **Hill**. No, they have not.

Senator **Reid**. Should the FAA and DOD have a memorandum of understanding to set out their respective responsibilities and duties with respect to NEPA documentation for special-use airspace designations?

Mr. **Hill**. Senator, that is a great idea. The Council has made some recommendations on a separate issue, same point, when we made recommendations with regard to Marine Corps overflights of the Cape Lookout National Seashore. You, I think, are familiar with that situation. We did make recommendations to that effect.

During my 8 years as chairman, there have been times the Council has made recommendations, and these are not binding on Federal agencies. We have had a couple of smashing successes, in spite of an agency's reluctance, when backed up by the Congress and most specifically by the appropriate appropriations subcommittees. I think it would be great.

Senator **Reid**. The bill I have introduced requires FAA to adopt procedures consistent with NEPA for the designation of special-use airspace. Without beating a dead horse, I see no reason—and based on your previous answers, I don't think you have any reason—that FAA cannot or should not have to meet this requirement.

Mr. **Hill**. What is most frustrating, Senator, is we have not said, FAA, you must do all the environmental documentation yourself. What we have said is, FAA, you must exercise independent judgment with regard to the environmental documents prepared by the military service.

Now, this is not extremely resource-intensive. It is not time-consuming. The time-consuming part is in the public participation and preparation of these documents. Review of the documents is a separate issue and requires a very small resource commitment.

The requirement of our regulations and the case law, as I recall, is that an agency must exercise independent judgment, and that is where we have had trouble with them. They will not even commit to that.

Senator **Reid**. Mr. Chairman, I appreciate your allowing me to participate. This really is helpful to me and the legislation I hope to be able to get through finally this time.

Thank you very much.

Senator **Lautenberg**. We appreciate your participation, Senator Reid. We work together in both major committees, the Environment and the Appropriations Committees, and this apportioning of space without regard to its impact just doesn't seem like a reasonable way to approach the problem, and I appreciate your bringing it to us.

Mr. **Hill**. Mr. Chairman, could I just interject one short thing?

Senator **Lautenberg**. Sure.

Mr. **Hill**. I want to commend the subcommittee on its hiring. You hired the former deputy general counsel of the Council on Environmental Quality, Ms. Schwartz, who is sitting right here. You may want to talk with her, Senator Reid. She was the staff member of the Council on Environmental Quality in charge of dealing with the FAA. She did a marvelous job, and I hope I defended your position well enough.

Senator **Lautenberg**. Ms. Schwartz, take that compliment—you work principally for Senator Simpson. Compliments come rarely, so take the ones you get.

Thanks very much. She knows that I am kidding. Senator Simpson has one of the better senses of humor, second to a couple of us, but he is known to have a very sharp wit. So we thank you for the recommendation for Ms. Schwartz. She has the job.

Thank you very much for your participation. Thanks for your service to the Government, and thanks for your candor.

Mr. **Hill**. Thank you.

Senator **Lautenberg**. We will now call on the next panel, Mr. Nitze, Mr. Vukmanic, and Mr. Johnson.

Thanks for being with us. It has taken some time. The interruption of the floor action did not make it easier. But we do welcome you. We invite you once again, for any statements that you are going to make, to try to keep them in short form. Why don't we start simply from right to left, and if you would, identify yourself and give your testimony.

Mr. Vukmanic.

STATEMENT OF FRANK G. VUKMANIC, DIRECTOR, OFFICE OF MULTILATERAL DEVELOPMENT BANKS, DEPARTMENT OF THE TREASURY

Mr. **Vukmanic**. Thank you very much, Mr. Chairman.

My name is Frank Vukmanic. I am the Director of the Office of Multilateral Development Banks with the Department of the Treasury, and I very much appreciate the opportunity to present the Department's views on the reauthorization of the appropriations for the Office of Environmental Quality and on the bill S. 1045.

I would first like to comment on the draft amendment and then move to S. 1045.

Treasury is opposed to legislation extending NEPA to international actions of the U.S. Government. We believe this approach is unworkable in the international context and especially in the international financial institutions. We have already expressed that concern about extending NEPA procedures to U.S. votes in the multilateral development banks, and we are also concerned that the legislation would affect the International Monetary Fund.

The Fund emphasizes broad macroeconomic policy issues—fiscal, monetary, and exchange rate measures—that relate to balance of payments adjustments and economic restructuring. These measures do not appear to us to have a direct effect on specific environmental issues.

Efforts to deal with environmental issues in the context of IMF programs could hamper the Fund's systematic responsibilities without having a significantly positive impact on the environment.

I would like to now turn to S. 1045. Treasury, like Mr. Hill, supports the objectives of this legislation. Indeed, we have taken, particularly in the last 6 months, the lead internationally to encourage environmental impact assessment in the MDBs and early dissemination of environmental information on specific projects and programs.

In March, Secretary Brady sent a letter to World Bank President Conable, strongly recommending that the Bank consider ways to make environmental information on specific projects publicly available on a regular basis well in advance of Board review of those projects. I would like to provide a copy of that letter for the record.

Senator LAUTENBERG. Without objection.

[The letter referred to follows:]

THE SECRETARY OF THE TREASURY
WASHINGTON

March 1, 1989

Mr. Barber B. Conable
President
The World Bank
Washington, DC 20433

Dear Barber:

Access to information about the World Bank's projects and programs has become an important issue for environmental and poverty groups in the United States, Canada, and other countries.

In my remarks at the Development Committee Meeting in Berlin last September, I indicated that public access to such information needed to be improved. The FY 1989 Appropriations Committee Conference Report said that public access to MDB documents has been unnecessarily restrained. The conferees directed the Secretary of the Treasury to make the relevant Bank documents available to the public if MDB policies have not been reformed by September 30, 1989. The report specifically requested access to documents that "underlie or carry out country development plans, describe the design of proposed projects, and evaluate the effectiveness of completed projects."

As you know, the Minister of Finance of Canada has proposed a four-point program to enhance support for sustainable development. As part of that proposal, the Government of Canada has asked for disclosure of more information about the environmental aspects of World Bank loans and has held discussions with other member governments about how this might be done.

Treasury staff have raised this issue with members of your staff. We have also discussed it with representatives from other member governments. There is general agreement that the issue needs to be addressed and various proposals are now being considered.

We strongly recommend that the Bank consider ways that environmental information on specific projects may be made publicly available on a regular basis, well in advance of Board review. The Bank should also consider how to make available after Board consideration environmental analyses contained in Board documents.

I hope that the World Bank will consider providing more information on Bank operations to the public in order to promote wider understanding of its role and activities.

Sincerely,

Nick

Nicholas F. Brady

Mr. **Vukmanic**. At the April meeting of the Development Committee of the World Bank and the International Monetary Fund, Secretary Brady again asked specifically for internal environmental impact assessment procedures and procedures for providing environmental information about individual loans to non-governmental organizations and to community groups.

At the annual meetings of the Asian and African Development Banks, held this year in May, the Treasury Department encouraged greater attention to environmental impact assessment. Environmental impact assessment and early access to information are also key conditions that the United States is now seeking to have incorporated in the IDA–IX replenishment agreement.

At the ministerial meeting of the Organization for Economic Cooperation and Development now in progress in Paris, Secretary Brady is pressing the organization to encourage the multilateral development banks to adopt environmental impact assessment procedures and to increase public access to environmental information about specific projects and programs.

We are also calling for greater emphasis on energy efficiency and conservation and programs to promote alternatives to chloro-fluorocarbons. We plan to take the same approach at the meeting of heads of state or government that is to be held in France in July.

These international initiatives reflect, at least in our opinion, the importance we attach to environmental issues, particularly environmental impact assessment and early disclosure of information which we believe are essential components of environmental reform in the multilateral development banks and in the borrowing countries of those banks.

However, we also want to emphasize that a key to success in this effort is the support of the other member countries, both developed and developing. Unless we can succeed in developing broad-based member support, we will not convince the multilateral development banks and ultimately the borrowing countries to adopt effective procedures in terms of assessment and to move to share information.

Last year we opposed legislation like S. 1045 because we thought it was counterproductive, because it incorporated provisions unilaterally imposing U.S. environmental standards on the MDBs. We, like CEQ Director Hill, want to compliment the drafters of S. 1045. We think they have gone a long way to try to address some of those problems. However, we still have concerns with the basic thrust of this bill, which calls for the identification and promulgation of criteria by the United States.

Section 2 requires U.S. executive directors to request that the banks prepare detailed statements on their environmental impact assessments, using criteria developed unilaterally by the Council on Environmental Quality. We believe that asking for statements and evaluation of the banks' work by using U.S. criteria would be misconstrued as unilateral interference.

I would like to stress that we really support the objectives of this bill, and we, like Director Hill, would like to propose an alternative to the bill. We would like to propose a change which we believe will address our mutual concerns while avoiding the problems of a potential unilateral action.

We propose replacing sections 106(b) and 106(c) of the bill with a provision to authorize the Secretary of the Treasury to initiate international discussions to develop criteria and procedures for conducting environmental impact assessments in the multilateral development banks. The goal of the discussions would be to develop in concert with other members in the bank internationally accepted criteria and procedures which could be adopted by the banks to guide their international operations.

Senator **Lautenberg**. How close are you to finishing, Mr. Vukmanic?

Mr. **Vukmanic**. I have no more than a paragraph to go.

Senator **Lautenberg**. All right, a quick paragraph to go.

Mr. **Vukmanic**. Thank you.

We believe this approach would address the committee's concerns about project design and appraisal. Moreover, we would encourage the banks to make available to the public environmental information on specific projects and programs in advance of Board consideration.

A year after enactment of the legislation, the Secretary could report to the Congress. Section 106(a) would, of course, have to be modified to reflect this new initiative.

I have one additional comment, and it is one sentence. Section 106(a) as it stands would include in its coverage the International Monetary Fund. We would strongly oppose, as we had earlier, its inclusion.

Thank you, Mr. Chairman.

Senator **Lautenberg**. Mr. Nitze.

STATEMENT OF WILLIAM A. NITZE, DEPUTY ASSISTANT SECRETARY FOR ENVIRONMENT, HEALTH, AND NATURAL RESOURCES, DEPARTMENT OF STATE

Mr. **Nitze**. Thank you, Mr. Chairman.

My name is William Nitze. I am the Deputy Assistant Secretary for Environment, Health, and Natural Resources at the Department of State.

We at State very much appreciate this opportunity to testify on several subjects of great concern to the Department. I will first turn my attention to the proposed national environmental policy related to U.S. involvement in the multilateral development banks and will then comment briefly on the proposal to apply extraterritorially the provisions of NEPA.

First let me comment on the question of ensuring that effective environmental reviews of projects are conducted by MDBs as an integral part of the project evaluation process. As my written testimony makes clear, we believe that the World Bank and the regional development banks have made very significant progress in this area over the last few years.

They have all established environment departments which, particularly in the case of the Asian Development Bank, are now integrally involved in reviewing and in fact in preparing project proposals, and we believe that the chief executive officers of all banks have made a commitment with their senior staff to incorporate environmental considerations in the project development process.

There has been some recent correspondence between the Secretary of the Treasury and head of the World Bank in this resect, and in our context, we at the Department of State, have also encouraged the banks to enhance their consideration of environmental impacts.

We share the Treasury Department's basic attitude toward Senate bill 1045. We strongly endorse the objectives of the bill. When we testified last year, we agreed with many of the things, in fact almost all of the things, that Senator Symms was seeking to accomplish. But we also have the same concerns as Treasury with respect to the specific provisions on extending the NEPA process.

We would agree with the Treasury Department that the best way to proceed is to work closely with other major donor nations and other supporters of the multilateral development banks in making sure that the bank management prepares an internal process whereby environmental assessment documents are prepared within the bank and made available to all executive directors and to a wider public for review prior to decisionmaking of specific funding proposals.

As Mr. Vukmanic has pointed out, there would be a 1-year period for us to work with Treasury and other departments in bringing this about. The Treasury Department would then report to the Congress on what it had achieved in this area, and then the Congress would be in a position to say whether or not additional congressional action was required. We think this is a responsive and appropriate process to deal with this problem.

Let me turn very briefly now to the proposed amendments to NEPA to extend the act extraterritorially. Our basic concern with the proposed amendment relates to U.S. participation in meetings and other negotiations with foreign countries and international organizations. We are frequently in a position where the United States has to take positions on issues with important environmental ramifications on relatively short notice.

I recently returned, for example, from two meetings, one of the Intergovernmental Panel on Climate Change Steering Committee in Geneva, another of the United Nations Environment Program Governing Council in Nairobi, in which decisions had to be made on very important environmental policy matters sometimes within the space of 8 to 12 hours because political initiatives would be taken by other nations to which the United States had to respond after, at most, brief consultations with principals back here in Washington.

In cases like that, it simply is not feasible to go through a formal environmental assessment process prior to decision or votes by U.S. representatives.

There may be another category of cases in which the Department of State plays a role in licensing pipelines or bridges or in otherwise approving capital or other projects where there is lead time and where a more formal environmental assessment process would be appropriate. But the type of general extension of extraterritoriality which is proposed would cause us serious problems in the conduct of foreign policy, and therefore, we would respectfully oppose it.

Thank you.

Senator **Lautenberg**. Thank you very much.

Mr. Johnson, you are caught in the unenviable position of having me be a clock-watcher with about 5 minutes to go before I have to get to the floor. So, once again, the committee will recess. I promise you a quicker turnabout than we had last time, but we must stand in recess while I go to the floor, and I ask your patience, and if you gentlemen would continue holding your seats—you can walk around if you would like, but just be available, please, for questions.

The committee stands in recess for 10 minutes.

[Short recess taken.]

Senator **Lautenberg**. We are back in session, and the hearing will proceed.

I will ask Mr. Johnson if you would give your testimony, please.

STATEMENT OF EDWIN L. JOHNSON, DIRECTOR, DEVELOPING COUNTRIES STAFF, OFFICE OF INTERNATIONAL ACTIVITIES, ENVIRONMENTAL PROTECTION AGENCY, ACCOMPANIED BY RICHARD SANDERSON, DIRECTOR, OFFICE OF FEDERAL ACTIVITIES, EPA

Mr. **Johnson**. Thank you very much, Mr. Chairman. I will do my best to stay within your 5-minute time limit.

My name is Edwin L. Johnson, and I am Director of the Developing Countries Staff at the Environmental Protection Agency. I am accompanied by Mr. Richard Sanderson, the Director of the Office of Federal Activities, who is sitting on my left.

We are pleased to be able to present our views on various amendments to the National Environmental Policy Act [NEPA] which are before this committee.

My prepared testimony provides several examples of areas where we believe that this law has been effective in the past. In summary, it shows that in the nearly 20 years since Congress passed NEPA, on the whole, this law has been an outstanding success in getting Federal decisionmakers to consider and document environmental issues early in the planning stages for Federal projects.

We at EPA believe that this NEPA process has also paid off in real environmental benefits, and we see no need for major changes in the NEPA process at this time.

You requested our views on the structure of the Council on Environmental Quality, including proposals to establish an Office of Environmental Quality with a single director. EPA has not studied alternatives in detail, and any formal proposal for restructuring must be further developed within the administration. But we believe that one option worth considering is a single director managing an Office of Environmental Quality and replacing two of the three Council slots with additional senior staff.

Now let me offer EPA's comments on S. 1045. As Mr. Nitze pointed out, we believe the multilateral banks have taken a number of constructive steps to develop environmental impact assessment procedures and staff to carry that out.

We strongly support the goal of S. 1045 to implement environmental reviews as an integral part of international development bank activity in which the United States participates. Last year, however, we expressed serious concern with using NEPA as the means for doing this.

We are pleased to see that S. 1045 takes a number of steps to address the concerns that we raised last year, and we congratulate the drafters on doing that. Most importantly, the bill recognizes, in section 2(6) of its findings, that "method and procedures for any environmental impact assessment should be adopted and utilized by the borrowing countries or international financial institutions themselves and cannot be imposed unilaterally by the United States."

The EPA strongly supports the committee's intent to strengthen, rather than supplant, the progress MDBs and developing countries are making in developing environmental review procedures. However, we are concerned that the new NEPA sections 106(a) through 106(c) still leave the bill open to criticism by the multilateral development banks and borrowing nations as a unilateral imposition of U.S. standards.

While the present text of S. 1045 may not impose such conditions literally, negative perceptions and adverse reactions could override the potential benefits of this legislation's approach.

We urge that section 106(a) be rewritten to invite the multilateral development banks to produce and make public environmental assessments of proposed projects under their own particular procedures and criteria.

We also support the views expressed by representatives of the Departments of the Treasury and State that sections 106(b) and 106(c) be rewritten to authorize the Secretary of the Treasury, in consultation with CEQ, State, EPA, and other interested agencies to begin international discussions toward agreement on appropriate procedures for environmental impact assessment in those MDBs where the environmental assessment procedure is thought to be weak.

Treasury could, as stated earlier, be required to report to Congress in 1 year on the progress of these discussions, and, if they have not proceeded far enough, take appropriate action at that time.

EPA as an agency is fully prepared to support such an international initiative because, as stated in paragraph 2(6) of the bill, we believe the solution lies in international consensus rather than unilateral action.

In summary, we strongly support the principal goals of the bill as set out in its findings and applaud the progress made in the drafting of S. 1045, but we feel that we should work together through the amendments we have suggested to prevent counterproductive perceptions of U.S. actions in this area.

Let me comment on one other proposed amendment to NEPA which would change section 102(2)(c) to cover Federal actions which occur outside the boundaries of the United States. This would apply NEPA to U.S. actions overseas which are not currently subject to NEPA. Some of these activities, however, are subject to environmental reviews under Executive Order 12114, Environmental Effects Abroad of Major Federal Actions.

As we stated in our March 1989 testimony before Congressman Studds' subcommittee in the House, EPA is not convinced that applying NEPA beyond the global commons would achieve the desired result of assuring that U.S. actions are environmentally sound. It appears that the language in the draft is so broad that it would apply NEPA directly to U.S. votes in international organizations, as discussed in more detail by Mr. Nitze, which we believe would be inconsistent with S. 1045.

Senator LAUTENBERG. We will take the remainder of your statement, Mr. Johnson. We have to conclude here in 10 minutes, and I am sorry that we did not allow you much red-light time, but we have your full statement for the record.

Senator LAUTENBERG. It is nice to know that each of you agrees with the intent of our legislation but disagrees with how we get there. That is almost like disagreeing with the intent, but not quite.

Mr. Sanderson, you are here as part of the team, and so I assume that you are available to answer questions.

Mr. SANDERSON. Yes, sir.

Senator LAUTENBERG. Would you agree that CEQ should get on with the task of issuing guidelines advising Federal agencies about how to address the global warming and ozone depletion in their EISs?

Mr. SANDERSON. As Chairman Hill testified earlier, he held several sunshine hearings. I was one of the participants in a sunshine hearing and made a number of suggestions. I did recommend that CEQ publish its findings and get on with their efforts.

Obviously, Chairman Hill has found an opportunity to work on this with the former administration and has the backing of the current administration. I would encourage him to push forward with the efforts.

Senator LAUTENBERG. Thank you.

Mr. Nitze, Secretary Baker said in January that we cannot afford to wait until all the uncertainties are resolved before we act to address global warming. He understands the seriousness of what is taking place. Do you think that one of our actions should be to require that environmental impact statements address global warming?

Mr. NITZE. Yes, I do, Mr. Chairman.

Senator LAUTENBERG. Mr. Vukmanic, for the past 4 years, Treasury has been pressing the multilateral development banks to provide environmental information on their proposed project loans to lending nations and the nongovernmental organizations in borrowing nations. But the World Bank has failed to respond to repeated requests to provide for greater public access to environmental information.

Last year, as part of the fiscal year 1989 Appropriations Committee report, the Congress directed the Secretary of the Treasury to unilaterally release relevant documents in its possession held by September 30, 1989. Secretary Brady wrote to World Bank President Conable on March 1, 1989, to advise him of this congressional directive.

Have you received a response to the letter to Mr. Conable?

Mr. VUKMANIC. Yes, we have.

Senator LAUTENBERG. What did he say?

Mr. **Vukmanic**. President Conable indicated that he agreed this issue was extremely important, was looking into it and working with his staff, and would be coming forward with proposals on it.

Senator **Lautenberg**. If the multilateral banks are unresponsive and Treasury is forced to unilaterally release project information, what types of documents currently in your possession would you release to the public?

Mr. **Vukmanic**. We receive documents that are submitted for Board consideration in our particular office which are used in the interagency process in evaluating loans that are being considered by the boards of the various banks. Those certainly would be available for release.

Senator **Lautenberg**. Is there any doubt in your mind that projects funded by the banks can have significant adverse environmental effects and that in some cases the banks have failed to assess the environmental consequences of their actions?

Mr. **Vukmanic**. None whatsoever, and I think the banks have admitted in a variety of instances that they have supported bad projects and have attempted, in a variety of instances, to rectify the errors and to move in new directions.

Senator **Lautenberg**. Should the United States support projects for which adequate environmental information has not yet been developed and released?

Mr. **Vukmanic**. That is a good question in the sense of what is adequate environmental information and when is it released. We receive information on a variety of projects fairly early as a result of our own early warning system and as a result of meetings by the NGOs with our EDs office and relevant bank staff at their request.

Where we are not satisfied by responses to questions emanating either out of those types of meetings or our own entreaties, yes, we should oppose them, and we do.

Senator **Lautenberg**. Do you know what the President is planning to do to fulfill his commitment to promote environmental consideration in multilateral development bank lending policies to avoid funding projects that cause environmental damage?

Mr. **Vukmanic**. I am sorry, I did not catch the first part of that.

Senator **Lautenberg**. Do you know what the President is planning to do to fulfill a commitment that he made to promote environmental consideration in MDBs' lending policies to avoid funding projects that cause environmental damage? He said that he would promote environmental consideration? Do you know what he is planning to do to fulfill that commitment?

Mr. **Vukmanic**. When you say the President, do you mean President Bush?

Senator **Lautenberg**. President Bush. There is only one President, as far as I am concerned. The other guys don't count.

Mr. **Vukmanic**. I understand, but we were speaking earlier of President Conable, and I thought you might have been referring to him, and I apologize.

I think what we have been doing for, as I indicated, at least the last 6 months, in a variety of international meetings, et cetera, is to press not only the institutions but also the membership, particularly the donor country membership, to move in the direction of tighter and stronger scrutiny in these institutions on the environmental areas. I mentioned two areas in particular—there is a third—that we have been pushing very strongly on.

The first is an actual environmental impact assessment by the institutions, and the second is the dissemination of information. There is a third area that really is tied to the dissemination of information, and that is stronger contact, earlier contact, with the nongovernmental groups, both the local groups and international groups, because we feel they provide quite a bit of information and it would help in the process and in fact should be a part of an EIA.

Senator LAUTENBERG. Mr. Nitze, do you want to comment on that?

Mr. NITZE. Well, I would certainly agree with what Mr. Vukmanic said, Mr. Chairman. The banks are making progress. It is not as fast as we would like. I mentioned the Asian Development Bank, where there is a very strong environment director, and I have been advised by him that he informally alerts NGOs back in countries proposing projects of project proposals at an early date and invites them to get involved in the process.

Now, a certain amount of that kind of thing will have to go on in the other regional banks and in the World Bank itself.

Senator LAUTENBERG. Well, once again, President Bush said that he wanted to make sure that environmental considerations were made by the MDBs in order to avoid funding projects that potentially could cause environmental damage.

Now, do I hear you saying that there is nothing other than the work that has been done in both of your departments that you are aware of that he is planning to do to curb that?

Mr. NITZE. Well, frankly, I have not received any specific guidance from the White House on specific steps, but I believe that the President would strongly support the efforts we are making to contact other major donor countries and to get them involved in the network of information sharing and prior consultations so that we can act in concert——

Senator LAUTENBERG. So the process is more informal than formal, you are saying?

Mr. NITZE. So far, yes.

Senator LAUTENBERG. Well, unfortunately—yes?

Mr. VUKMANIC. If I could respond to that also, while I would agree with Mr. Nitze—and I have not received any formal guidance, either—the process is both formal and informal. We use the occasion of formal meetings in formal sessions to raise these issues, and we are directed to do so from above, so we are not——

Senator LAUTENBERG. By formal, I am talking about an understanding, a set of guidelines, rules, regulations that say the following steps have to be taken. Are we doing this by the process of gentle persuasion?

Mr. VUKMANIC. I would say it is slightly more than gentle persuasion, but certainly we do not have a set of guidelines that we have promulgated for the institution. What we have said to the institution is, we would like to see those guidelines.

Senator LAUTENBERG. We are going to have to conclude. I appreciate, A, your patience; B, your testimony; C, your response. I hope that, D, you will be available quickly to answer any written inquiries that come from any members of this panel.

Senator **Lautenberg**. We thank you.

This hearing is now adjourned.

[Whereupon, at 4:56 p.m., the subcommittee recessed, to reconvene at the call of the Chair.]

[Statements submitted for the record and the bills S. 1045 and S. 1089 follow:]

TESTIMONY

OF MICHAEL McCLOSKEY
SIERRA CLUB
BEFORE THE SUBCOMMITTEE ON SUPERFUND, OCEAN AND WATER PROTECTION
OF THE
COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS

Washington, D.C.
June 1, 1989

Mr. Chairman, I am Michael McCloskey and am the Chairman of Sierra Club. I am appearing here today on its behalf. I also served as the Chairman of Project Blueprint's Working Group on the Council on Environmental Quality. That Working Group was composed of representatives from a cross section of environmental groups and a number of former members of, and staff for, the Council on Environmental Quality. As you know, Project-Blueprint put together a report to the new administration containing over 700 specific recommendations which it felt would improve performance of federal environmental programs.

Our Working Group on CEQ felt that it is more urgent than ever that the President be aided by a strong, well-staffed unit in the White House with expertise on environmental issues and that such a unit be led by an experienced, senior Counsellor to the President. Environmental problems have escalated to a level that threatens the stability of the habitat on this planet for both the human species and much of the rest of the biota too. Global environmental issues are becoming a major preoccupation of statecraft and are emerging everywhere as a focus of public concern. Many of our domestic programs to protect the environment are faltering and failing to yield results.

The President cannot get the advice and perspective he needs on these problems by just turning to any one federal agency or the Domestic Policy Council. The agencies' expertise is limited by their mission, and the Domestic Policy Council does not have the staff depth to grapple with the challenge.

The logic which caused CEQ to be created in the first place is more compelling than ever, but the Council has been permitted to atrophy over this decade. It has been shunted out of the mainstream in preference to the Domestic Policy Council, and its staff has withered to about one-sixth of what is needed.

We believe it is urgent that the President revive CEQ, and we hope he will ask for the resources needed to rebuild its staff to between 40-50 people. We hope too that the Congress will provide the funding for this.

However, in reviving CEQ now we think it is appropriate to reflect on what has been learned over 18 years and to re-structure it so that it can be as effective as possible. In essence, we believe CEQ needs strong, unencumbered leadership and that it needs to focus on those things that it uniquely can do best. It needs a streamlined structure to equip the President to be able to address the critical environmental problems that are of growing concern.

When the Council was established, it was modeled on the Council of Economic Advisors, and three Council members were specified. But in reality, the extra two Council members--besides the Chairman--have never had a very clear or useful role. It is the Chairman, not the other two members, who relates to the President and the White House; the Chairman really is an awkward position if he has to convince the other two to go along with what he has worked out with the President. The Chairman also needs to be in charge of the staff and not to have to hold meetings to make decisions on staff direction. In reality, few meetings of a deliberative nature occur. Originally, it was thought that the Council would make environmental forecasts similar to economic forecasts, but the Council has not really been equipped to do that; thus, a melding of judgments for that purpose has not been important. Nor has voting for regulatory purposes been important (analagous to an independent regulatory commission) since CEQ's regulatory role on NEPA regulations is very narrow. Thus, we think it is time to dispense with the confusion and unnecessary expense of the other two Council members.

Our CEQ Working Group also felt that CEQ should clear the decks to focus on the most immportant work. We would have it focus on high-level initiatives to lay before the President to address the crises of our time: imminent changes in the global climate, the destruction of the ozone layer, the mass extinction of species in the tropics, the decimation of forests, the sea of toxic chemicals enveloping us, the growth again of air pollution levels in the U.S., disarray in energy policies, and hightened conflict over managment of public lands. Only CEQ can look across the contributions and limitations of agencies to conceive of how the pieces of public policy can be put together for optimum impact. On global warming, EPA, DOE, NOAA, and the State Department cannot put a rational response together by themselves; CEQ could give the President the expert staff assistance to coordinate a well-conceived response. It could take on additional functions in this regard such as are suggested in Section 103 of Senator Gore's bill (S. 201) on a global warming response. Interagency advisory committees can rarely put together well drawn proposals by themselves.

But CEQ will not have a critical mass of resources to tackle this kind of work if it is bogged down with routine work in the way it often was in the 1970's. We recommend that a rejuvenated CEQ forget attempting to undertake original research, to reach out to undertake public education, and to do reports on a wide range of issues. We think it should let agencies such as EPA chart the status and trends of levels of pollution and degradation. And we think CEQ should not put over half its energies into publishing voluminous annual reports, which attempt encyclopedic coverage of all problems. Other think tanks today assess the state of state, national, and world environments. CEQ's annual reports should focus on identifying new problems, gaps in programs, failures and inadequate performance, and remedies--new initiatives needed to achieve better environmental quality.

Some routine tasks cannot be avoided since they come with the territory: monitoring NEPA compliance by federal agencies, handling occasional referrals under Section 309 of the Clean Air Act and Section 1504 of NEPA regulations, and handling Section 11 exchanges with environmental law experts in the Soviet Union as well.

However, CEQ need not have more than about a third of its time go into these routine actiivities and the annual report. The bulk of its time should go into analyzing critical problems, working with the President and his other advisors on remedies and new initiatives, and examining how federal agencies are responding in carrying Presidential environmental policies forward. In essence, we think the President should see CEQ as his key environmental staff in the White House, not as an alien appendage. In this way, CEQ can play a valued and influential role in shaping Presidential policy.

The measure which Senator Lautenberg has just introduced (S.) picks up the spirit of our report on CEQ in its provision (Section 2) which would give a new focus to the requirement for an annual report. It would replace the existing wording with a directive that the report identify new and emerging issues (similar to our suggestion on identifying "deficiencies") and various ways to deal with problems: strategies, initiatives, and priorities (similar to our point on "remedies"). We support this change.

We also support and commend the other procedural changes suggested in the bill, which would call for consulting with the public prior to preparing an Environmental Impact Statement (EIS) and which call for more attention to mitigation measures. Recent court decisions have cast a cloud on requirments to specify mitigation measures. Senator Lautenberg's bill ~~calls~~ for specification of the mitigation measures which would attach to each alternative examined in EIS's, the mitigation actually to be undertaken, and a post-project audit of what mitigation was actually undertaken and its effectiveness, in a sampling of cases. These mitigation provisions should build up a better body of knowledge on the extent to which mitigation works or fails in some way; when mitigation is contemplated, we should know what works and why by learning from experience. The provision in the bill regarding analyses of the worth of predictions of adverse environmental effects is also valuable. We also are pleased to see that the bill would incorporate the 1977 Executive Order directing CEQ to develop regulations for federal agencies to follow in implementing NEPA. These regulations are now well accepted, and it is sensible to provide a statutory basis for this important set of regulations.

One of the most significant provisions of the bill deals with the international dimensions of NEPA. As I mentioned at the outset, the greatest environmental challenges of our time are the ones of global scope and the ones affecting the biological capital of the planet. NEPA originally spoke of the dangers to the "biosphere", which is planetary in scope, and recognized the "worldwide ... character of environmental problems" and called upon federal agencies to " maximize international cooperation" in attempting to prevent a "decline in the quality of mankind's world environment." However, subsequently disputes clouded the extent to which NEPA applied abroad.

Therefore, it is time to spell out the international scope of NEPA more clearly.. The measure which Senator Lautenberg has put forth does that. It would establish that the United States should aim to "provide world leadership in ensuring a healthy ("healthful"?) and stable global environment" and make it clear that federal agencies have an obligation to "promote protection and enhancement of the global environment." EIS's would also have to include consideration of global impacts.

All of these points undergird the most important of the bill's provisions, namely the application of NEPA extraterritorially. The bill makes it clear that EIS's must be prepared on major federal actions of the United States which occur beyond our borders, except for actions arising in connection with armed conflict, intelligence activities and arms transfers. We have no quarrel with these exceptions, but there is another blanket exception for anything done "to protect the national security of the United States." That exception may be overly broad and be used to shield activities in selecting sites abroad for military bases, which can have severe environmental repercussions. There are at least two such disputes underway in Japan right now with respect to proposals to locate U.S. naval facilities in a national park (Miyaka-jima) and in a proposed regional park (Zuchi). During peacetime, not all such problems should be exempted from the EIS requirement and swept under the rug. At the very least, the President should be required to make an explicit finding that national security considerations require an exemption notwithstanding any environmental impacts, no matter how severe.

Many U.S. agencies mount efforts overseas that can have major adverse impacts on the environment. The Agency for International Development (AID) spends millions abroad each year, and these outlays can have major envionrmental consequequences, as in the Sudan where we shape forestry and agriculture policy by our spending. Fortunately, AID already does prepare "environmental assessments," which are a modified version of EIS's. But it is the only U.S. agency which attempts to comply with NEPA abroad. The Bureau of Reclamation and the Corps Engineers help plan major dams abroad; the Forest Service provides advice on forestry plantations; the Fish and Wildlife Service advice on which wildlife values are significant as conflicting development looms; and the National

Park Service advises on where nature reserves and parks should be. And of course, the U.S. Defense Department's facilities are dropped into the most unlikely places across the earth, including into remote islands with the most vulnerable ecosystems.

All of these efforts abroad are designed to be helpful, but to be sure they are, they should reflect our national policies of being good environmental stewards under the terms of NEPA. Where it is determined that U.S. agencies are making a material contribution to major actions affecting the enviornment, an assessment of environmental impacts should be prepared.

Now Section 1(b)(1) of Senator Lautenberg's bill does not squarely say that. It leaves unclear how to regard those actions occuring in other countries, and in international commons, where the U.S. government is merely a significant contributor to the result, and not the sole actor. It leaves unaddressed the distinctions between a "major action" involving other parties and a "major federal action" involving the U.S. alone or the U.S. in a primary role. We think the bill ought be re-worded to require an environmental assessment wherever the U.S. makes a "material" contribution to determining the outcome of action which is major in its own right, at home or abroad.

This is precisely the question which arises with respect to U.S. participation in the deliberations of multi-lateral development banks (MDB's), such as the World Bank and the various regional development banks. Their decisions with respect to loan commitments trigger immense impacts on the environment. The U.S. controls a significant block of votes (nearly 40% of a majority), and its decisions in casting these votes plays a material role in shaping what happens--in determining how much of the Amazon rainforests survive and whether indigenous peoples live. If environmental assessment is to be extended to any overseas decisions in which the U.S. is involved, it ought to apply to these actitivies, which are the greatest in consequence of any.

Now we are not suggesting that NEPA compliance in such cases necessarily requires preparation of a full-blown EIS. But we do believe that the U.S. Treasury Department should make knowledgeable decisions in casting our vote, informed by an analysis of the environmental consequences of the proposed project. It should insist that the World Bank and other MDB's, along with the loan applicant, prepare an environmental assessment for each project and furnish it to the voting countries. The World Bank already claims it is engaging in some sort of substantive process of environmental assessment. It needs to be prodded into developing a document conveying the essence of that assessment which can be shared with those who must make decisions. If such documentation is not forthcoming, we urge that the U.S. Treasury Department be barred from voting on such loans. We should not dignify a process of making ignorant decisions. We really doubt that the World Bank and other MDB's will wish to see the U.S. permanently abstain from voting and lose interest in these institutions and their funding needs.

We are not trying to burden our Treasury Department with preparing 200 EIS's each year. It clearly is not staffed to do this, and the critical information is not in its hands; it is in the hands of the banks and the borrower nations. But the Treasury Department should demand the information it needs and go through a process of evaluating the weight of the environmental evidence in determining how to vote.

In the bill which Senator Symms and others have introduced (S. 1045), there is an attempt to sort out a process for addressing the need to get the Treasury Department armed with environmental assessments for such loan projects. This bill would have CEQ identify criteria for such international environmental impact assessments, have the U.S. ask for them, and offer staff and technical assistance toward that end. The Treasury Department would not have to verify the information in them but only identify missing data and inadequacies in coverage. This bill represents a thoughtful and helpful effort to move in the right direction as it focuses on the special problems of U.S. participation in the work of MDB's. Its provisions on criteria and technical assistance might well be included in Senator Lautenberg's bill. However, we believe that the U.S. should not merely ask the MDB's to prepare environmental assessments. We should make it very clear that our country is not prepared to vote and participate at all unless they are prepared and made available.

Some regard environmental assessment as a mere formality and a lot of paperwork. However, it is really an "action forcing" process to ensure that environmental impacts are identified and evaluated as decisions are made to move forward with a project. Documentation is necessary to show that this work was actually done, and how well, and to allow ultimate decision makers to be informed by it. Those who argue against it are really saying these considerations are not important. The U.S. Congress should make it clear that this is no longer an acceptable response.

U.S. citizens are no longer alone in thinking these considerations are important. Citizens all over the world are protesting callousness toward the environment. Public opinion on this question in the Third World is changing, and new environmental groups there are pressing their governments to change, as are their Environmental Ministries. It is time we help them.

In conclusion, we support Senator Lautenberg's bill and urge that its provisions with respect to extraterritoriality be clarified and strengthened. These provisions are not designed to impose the will of the U.S. on the rest of the world. They are designed to make sure that agencies of the U.S. government act responsibly when they operate abroad so as not to foreclose the options of the rest of the world's environment as it evolves with humanity.

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TESTIMONY OF

PROFESSOR NICHOLAS A. ROBINSON

A HEARING OF

THE SUBCOMMITTEE ON SUPERFUND,
OCEAN AND WATER PROTECTION

Of The

COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS
UNITED STATES SENATE

REGARDING
THE NATIONAL ENVIRONMENTAL POLICY ACT

On

June 1, 1989, 2:00 p.m.
Room 406
Dirksen Senate Office Building

Mr. Chairman,

Its an honor to be asked to testify today before the Subcommittee on Superfund, Ocean and Water Protection of the Senate Environment and Public Works Committee, regarding the National Environmental Policy Act (NEPA), and possible legislation to reauthorize the Office of Environmental Quality and S. 1045 which promotes use of environmental assessments on multilateral development bank loans.

These matters have been of interest to me for two decades. I served in 1970-72 on the initial Legal Advisory Committee to the Council on Environmental Quality; that Committee advised CEQ and its first Chairman, Hon. Russell E. Train, on the establishment of the environmental impact assessment ("EIA") procedures reburied by the then newly enacted National Environmental Policy Act (NEPA).[1] I have written about these issues,[2] practiced under NEPA before agencies,[3] worked to establish New York's little NEPA,[4] discussed EIA methodology with foreign nations as a U.S. Delegate to USSR Environmental Protection discussions under Presidents Nixon, Ford, Carter and Reagan[5] and to a United Nations consultation on EIA convened by the UN Economic Commission for Europe.[6] I was pleased to testify last year in the Senate on issues related to these hearings.[7] Most recently I edited the proceedings of a national conference on the preparation and review of environmental impact statements held at West Point.[8] Suffice it to say, my experience has ranged from EIA conducted in small villages to federal agencies and to consulting on EIA by other nations. I chair the EIA Task Force of the Commission on Environmental Policy, Law and Administration (CEPCLA) of the International Union for the Conservation of Nature and Natural Resources (IUCN).

At the outset, Congress should be proud of the innovation which it designed in NEPA. As Professor Caldwell, an advisor to the Senate in the early design of NEPA, has noted, "the EIS process institutionalizes patience, caution and looking before heaping. Few, if any, among the critics of NEPA would act in their personal affairs in the manner that government decision makers formerly acted in relation to the environment. Legislation such as NEPA has been accepted because we are environment - shaping animals, sufficiently intelligent to recognize that our survival requires self discipline. In this perception of our need to supplement our inherent nature with social inventions designed to protect us against our susceptibility to error may lie our best hope."[9]

So useful has been the EIA process that half the states now use it. Similarly, the federal and state governments of Australia[10] and Canada,[11] our Western European allies in the European Economic Community,[12] New Zealand,[13] the Association of South East Asian Nations (ASEAN)[14] and even the USSR through its newly created State Committee on Environment Protection (GOSKOMPRIRODA),[15] are now using or establishing EIA procedures. The UN Economic Commission for Europe is considering a draft treaty for transboundary EIA,[16] and the

UN Environment Programme has proposed that all developing nations use EIA.[17]

It is a remarkable event that legislatures in half of the states of the United States of America and in some 35 foreign nations and states have each independently followed Congress' lead and enacted EIA.

The reasons for this trend are evident, NEPA works very well. There was some initial difficulty in adding EIA to decision-making, but once it is incorporated it improves decision-making. Perhaps the best recent account of acknowledging the success of NEPA was given by John S. Doyle, Jr., Acting Assistant Secretary of the Army for Civil Works:[18]

> "Implementation of the environmental assessment process reburied by NEPA has been a learning experience for the Army. And what we have learned is that the NEPA process is a valuable tool to decision making. The Army leadership views the environment as a resource, equal to manpower and money, that we can ill afford to squander. That is not to say that we have perfected the process. There are those who continue to view the Environmental Impact Statement as a burden. But their number becomes fewer as we learn more about the process, and as the process itself continues to demonstrate its usefulness in making smart decisions."

If NEPA is to work well, the environmental reviews must begin early in considering a major federal action and then receive due consideration at key decision-making points in the process. At some point, a deliberate consideration of suitable alternatives to accomplish the same end is needed. Selection of the alternatives should be made based on avoiding or eliminating environmental impacts which could arise from the action. The key tool in EIA is the selection of mitigation techniques to minimize the unavoidable environmental impacts.

These sensible steps appear uncontroversial. They conserve scarce budget dollars and scarce natural resources. These NEPA procedures allow the development of consensus following public comment and agency peer review. They assure that any agency is charged with stewardship of America's shared water and air quality, agricultural productivity, watershed protection, fish and wildlife management, and other environmental values. The preparation of the initial Environmental Assessment and the full Environmental Impact Statement is a procedural "action-forcing" mechanism. "Externalities" were finally to be considered and weighed by federal decision-makers.

It has not always been easy for federal agency managers to learn how to do an EIS. Judicial review is now relatively infrequent, and the process works fairly well; e.g. in 1986, 250 draft EISs were prepared by 25 types of actions, and most succeeded in avoiding or mitigating adverse effects.'[19] The number of law suits arising from federal EIS procedures was negligible.

Nonetheless, the NEPA process is not easy. Its problems are of three types:

(1) Federal budget constraints encourage use of Environmental Assessments to make findings of No Significant Impact, rather than prepare a full EIS; the Environmental Impact Assessment staff in the US EPA Office of Federal Activities, which audits the NEPA process of other agencies as required by federal law,[20] is too thinly staffed to carry out its mandate. The result is that we cannot easily tell today when agencies avoid their NEPA duties. The Congressional charge to EPA to monitor and report is not being fulfilled. Very few court cases arise, and judicial review alone can not be relied upon the secure compliance with NEPA, unlike the early years of NEPA. The judiciary's fear of a flood tide of suits simply unrealized.

(2) Federal agency heads are often like "true believers" in a cause. They are so sure of their projected actions that they "don't want to be confused by the facts." Indeed, they fear that any scrutiny of their project's design flaws will be used to kill the project, rather than be studied and redesigned to improve the proposed action. These managers try to ignore Congress' NEPA mandate, and will confuse the message delivered on the EIA process with the process or the messenger. They often "kill" the messenger. A recent example is the decision by the Bush Administration to transfer Bruce Blanchard, the seasoned Director of the Office of Environmental Project Review in the Department of The Interior, out of his job, into one with no NEPA role. Blanchard offered useful comments on this problem at the 1987 West Point Conference:[21]

> "The purpose of EIA is to improve decision-making. Notwithstanding the value of a public disclosure document, EIA is an empty gesture without top-level management commitment to both environmental values and to the EIA process, this commitment, or lack thereof, is immediately perceived and continuously conveyed throughout an organization with concomitant results, good or bad. NEPA provides no tangible rewards for decision-makers or practitioners, only penalties for failing to follow the process. In organizations with limited commitment to the process, this leads to the pragmatic practice of taking risks. On the surface, this may make sense because only negligible fraction of Environmental Assessments (EA) and less than ten percent of Environment Impact Statements (EIS) are challenged in court. On the other hand, the penalty of getting caught may be a considerable delay in reaching a decision on a proposal, possibly one which moves the decision into the tenure of a subsequent decision-maker. ... Environmental impact analysis is an acquired skill. It is not learned in a class, at a lecture, by looking at a film, or by listening to others. Like learning to write, it is learned by

> doing and by being critiqued on one's product. In organizations with a limited number of EIA personnel, with capability spread too thin, or with high turnover of personnel, this represents a constant training challenge. This problem underscores the need for some form of quality control. ... Last, EIA compliance or quality control offices can be dangerous places to work. Program managers are not always happy with it, and the office is 'damned if it does and damned if it doesn't.' If the office enforces the EIA process, program managers complain bitterly of delay or unreasonableness, because their reward is in implementing their programs. If the office does not enforce the process in order to get along with the program managers, the office is the first to be blamed if the proposal is delayed or stopped by external challenges to the EIA."

As Bruce Blanchard indicates, making EIA work in a large agency requires diligence and routine. It is important that Congress signal to agency managers that it expects NEPA's environmental stewardship duties to be taken seriously. One way to do so would be to require post-decision reviews and reports to determine whether impacts were adequately studied and mitigation measures were effective; the NEPA regulations authorize agencies to "provide for monitoring to assure that their decisions are carried out,"[82] but no "action-forcing" process as yet requires agencies to implement this regulation. Congress should mandate it by statute. Canada's federal EIA process is now experimenting with post-EIS audits,[83] and the US federal NEPA process should catch up with Canada in this regard.

In short, there are a number of critics of the NEPA process who either do not yet know how to implement it or would rather not learn. These latter-day "know-nothings" would like to throw the baby out with the bath water; the still infant NEPA process is sometimes confused with the instances of its misuse (as in compiling too long an EIS with unneeded data, or in project opponents demanding study of unrelated issues, or in a court which is fearful of the spectre of delay and declines to enforce the procedures by way of preliminary injunction). The answer is to refine and improve the EIA process, as was done when in 1978 the Council on Environmental Quality (CEQ) revised the NEPA regulations.[84] It is time for Congress again to signal that agencies are expected to solve these problems constructively, and not merely carp about them confusingly.

(3) Finally, the NEPA process should be observed in its full scope. Congress intended in NEPA to recognize "the worldwide and long-range character of environmental problems and, where consistent with the forcing policy of the United States, lend appropriate support to initiatives, resolutions, and programs designed to maximize international cooperation in anticipating and preventing a decline in the quality of mankind's world environment."[85] Unlike the EIS requirement in §102(2)(C) of NEPA, Congress provided no "action-forcing" mechanism for this international directive that "all

agencies of the Federal Government shall" act on the premise that we face worldwide and long-range environmental problems. Foreign affairs agencies have resisted using EIA to implement this policy.

In some instances, the EIS procedures did facilitate recognition of international environmental impacts and measures to avoid those impacts. One good example is the Panama Canal Treaty. Panama is crucial to US foreign policy for its strategic canal; but the area also is crucial in preventing aftosa (hoof and moth disease) from spreading out of Latin America to Central and North America. NEPA litigation had required the Federal Highway Administration to consider these impacts before constructing missing links in the Pan American Highway.[16] Sensitized to these concerns, the Panama Canal Treaties made provision for a Joint Commission, US-Panama, to cope with sanitary and environmental protection issues. The Department of State complied with NEPA and prepared a full EIS on the draft Panama Canal Treaties before they underwent Senate ratification. The (Acting) Secretary of State, Warren Christopher, acknowledged the valuable guidance NEPA provided:[17]

> "Since Panama's unique geographic location makes it important to the environment of many nations, both the United States and Panama are conscious of the need to protect the environment and respond to the public health needs of the Canal Zone and the surrounding area. ... The National Environmental Policy Act has provided useful guidance in drafting the Panama Canal Treaties so as to avoid or mitigate the adverse environmental effects which might result from the implementation of the treaties. We recognized the importance of NEPA procedures in formulating environmentally sound policies as well as the value of public participation in the NEPA review process. The Final Environmental Impact Statement (EIS) on the Panama Canal Treaties, prepared in accordance with NEPA and issued on December 27th, discussed those issues which will be addressed by the Joint Environmental Commission. And, the public comments submitted regarding the draft EIS have been carefully considered and are reflected in the final statement. More specifically, the final Environmental Impact Statement discussed current and transitional steps needed to protect the Pipeline Road and other important forests areas. It also analyzes the need for a forestry management program and the dangers to flora, fauna and soils should the natural resources of the Canal Zone not be adequately protected."

The Secretary of State noted further that any new canal, sea level canal or new canal lanes would require a further EIS under NEPA.

Given the current foreign policy impasse over free elections in Panama and the dictatorship of General Manuel Antonio Noriega, the State Department is using the Panama Canal Treaties to assert US rights under international law. An investigation by the Organization of American States is now examining the violations of US treaty rights. Law is being used as a principal procedure for US foreign policy. If the OAS reports treaty violations, a range of sanctions including force are available to enforce the treaties.[28]

There are other instances of NEPA's EIA process accommodating international environmental protection concerns. Federal Courts have required the US Agency for International Assistance (AID), the Eximbank, and other foreign affairs agencies to comply with NEPA.[29] In several instances, citizens from other countries have participated fully in EIA hearings and been plaintiffs in subsequent judicial review proceedings.[30] The courts note that "NEPA provides foreign nationals with certain rights when their environment is endangered by federal actions."[31]

Unfortunately, many federal agencies have not chosen to look at the worldwide and long-range implications of their immediate decisions. Major federal actions have short-term and long-term impacts. The latter are insidious in that they are cumulative, growing incrementally as by accretion. Which is the "straw" to break the camel's back? Since each "little" act can be viewed discretely and alone, it is easy to forget the cumulative effect.

Global problems cannot be resolved without such analysis. Protection of the stratospheric ozone layer from the release of chlorofluorocarbons or measures to add to carbon dioxide concentrations which contribute to potential global warming ("greenhouse effect") illustrate gradual acts with possible long-term impacts.[32] There are major federal actions which are suited to address such issues; for instance, most analysts of the greenhouse effect recommend that every possible means be used to switch to non-fossil fuels which do not add to CO_2. The switch can also be useful in eliminating urban smog. In British Columbia, Canada, some 8,000 vehicles use natural gas instead of gasoline to abate local air pollution and California is testing methanol in state vehicles.[33]

When the National Highway and Traffic Safety Administration (NHTSA) did an environmental assessment to reduce national fuel efficiency standards for the model year 1989,[34] it avoided undertaking the full EIS as contemplated by NEPA. The Natural Resources Defense Council had commented on the NHTSA's proposal to reduce passenger car corporate average fuel economy (CAFE) standards for the model year 1990; NRDC criticized the NHTSA for finding that no significant impact was associated with its rule-making on the CAFE standards when the rollback meant 68 tons/year of volatile Organic Hydrocarbons would be added to New York City (4,476 tons/year nationally, and 17.7 million tons of CO_2 added to the atmosphere.[35] NRDC and the Competitive Enterprise Institute have filed petitions for review, now pending in the Court of Appeals for the District of Columbia.[36] These sorts of environmental impacts are today rarely studied by agencies.

A similar effort to encourage the NHTSA to do what it can to avert the incremental worsening of long-range and worldwide trends was initiated four years ago by the States of California and New York, several citizens and the City of Los Angeles.³⁷ Circuit Judge Ruth Bader Ginsburg found that the NHTSA rollback of the 1986 CAFE standard was not arbitrary and that the record was sufficient to justify the NHTSA's use of an Environmental Assessment rather than a full EIS to weigh impacts. At issue was whether the impacts resulting from the CAFE standards were "significant" under NEPA. NHTSA had relied upon the advise of the US Environmental Protection Agency that the revised CAFE standard would not have a significant effect on air quality. NHTSA paid little heed to such factors as increased weight of cars or greater strains on the capacity of pollution control equipment resulting from heavy engineer.

In the Court's words: "Appreciating that the question is close, we decline to indict as arbitrary and capricious the agency's decision, made in view of time and resource constraints, to ignore in this case possible increases in emissions within the Clean Air Act Limits. ... In sum, while NHTSA (and EPA) might have taken a 'harder look,' and NHTSA might have avoided more assiduously any prejudgment of the issue, [prior to receiving the EPA analysis of air quality impacts, and without offering any other substantiating information, NHTSA stated that its proposed rule amending the MY 1986 CAFE standard would occasion 'little change in air quality.'] ... we are satisfied that NHTSA did identify the relevant areas of environmental concern and then decided rationally that its rollback for MY 1986, and that year only, would not have a significant environmental impact."³⁸

When the District of Columbia Circuit Court of Appeals faces the pending NRDC challenge to the 1990 CAFE standards, it will apply the test that it outlined in its 1988 ruling by Judge Ginsburg. Has NHTSA made a sufficiently documented record to demonstrate before its decision that it quantitatively and qualitatively analyzed the cumulative impact which the revised CAFE standards will have on air quality and related environmental issues such as greenhouse warming? If NHTSA's Environmental Assessment is sufficiently clear to constitute a hard look at the issues, and NHTSA concludes there is no legally "significant" impact, then it is unlikely the Courts will substitute their judgement for that of the administrative agency. The result is a legally sanctioned "blinder," by which an agency need not examine a class of impacts and may do nothing to avoid these impacts.

If Congress wants such incremental, cumulative impacts, to be weighed as "significant," it will have to direct that agencies do so. While NEPA is broad enough to justify an agency deciding to look at such impacts, its not compelled to do so in "close" questions.

These examples show that the EIA process can be used effectively to coordinate federal agency responses to incremental global degradation trends. Indeed, as the world's population grows by over one billion new people during the next decade, unless each major development to accommodate this population growth is accompanied by EIA in every country, the world will see a rapid deterioration of environmental quality as a result of the cumulative effects of many small actions. This is why UNEP and the UN ECE are encouraging more widespread use of EIA.

Thus, after two decades of experience with NEPA it is evident that EIA is a valuable tool when used ably, but its use is still resisted by expedient, often sincere bureaucrats, intent on doing their job narrowly. Congress should refocus the lenses by which these agency officials see their jobs. Some amendment to NEPA §102(2)(C) is needed to require a written statement explaining what mitigation measures are to be used, to require analysis of the incremental impact on long-range global environmental trends, and to require follow-up audits to determine if the mitigation was effective.

In light of this analysis, the following comments are provided on (1) S. 1045 regarding the development of EIA on proposed multilateral development bank loans, on (2) the status of the Council on Environmental Quality, and on (3) the effect of this term's US Supreme Court decisions on NEPA, and (4) on the draft of legislation for possible clarification of NEPA.

(1) S. 1045 (Symms, et al)

This legislation,[39] is a useful improvement on the bill proposals about which I was privileged to testify last year.[40] I shall not repeat that testimony except to note that CEQ Chairmen under Presidents Ford and Carter both urged the use of EIA for overseas development projects. Much of the testimony of last year's hearings supports S. 1045, William K. Reilly, testifying then as President of WWF/Conservation Foundation, praised NEPA when it worked to cause agencies to take the environment seriously, but cautioned that the object was to change agency behavior. The issue then, as now, in Mr. Reilly's words is "how can we ensure that international financial institutions promote sustainable forms of development?" To realize "sustainable development" as the UN's World Commission on Environment and Development ("Brundtland Commission") described it, will require substantial new efforts at extending Environmental Law.[41] The WCED recommends that a priority be given to global environmental assessment and reporting.[42] It noted that "several countries have already formally instructed their representatives on the Board of the World Bank to ensure that the environmental impacts of projects proposed for approval have been assessed and adequately taken into account. We recommend that other governments take similar action, not only with regard to the World Bank but also in the Regional Banks and other institutions. In this way they can support the on-going efforts within the Banks and other institutions to reorient and refocus their mandates, programmes, and budgets to support sustainable development."[43]

S. 1045 goes a long way toward encouraging that environmental protection can become completely and thoroughly internalized in the routine, day-to-day operations of international financial institutions, as both Mr. Reilly and the WCED have urged. Last year Mr. Reilly had questions about whether a full NEPA EIS would be needed, since the Treasury Department's vote was not itself the "action with impacts." In S. 1045 we need not worry about undue burdens on the Treasury as one mere vote,; as Mr. Reilly put it, "the delicate task of outsiders, whether multilateral development bank representatives or WWF staff, is to play a catalytic facilitating role in helping developing country groups become effective participants in the economic development process while assuring that the initiative and solutions so essential for sustainable development come from them, the people and governments themselves."[44] Solutions can emerge only from an intelligent, informed assessment of options, their advantages and detriments. Properly employed, the EIA process encourages participation and informed decision-making. Congress in 1981 in the Foreign Assistance Act provided a requirement that AID, and "all agencies and officials responsible for programs or projects" under the Act, "prepare and take fully into account an environmental assessment of any proposed program or project under this chapter significantly affecting the environment of any foreign country. ..." These EAs are available to the public under the Freedom of Information Act,[45] but public comment is not sought. AID must do full EISs, with public comment under NEPA, in other circumstances as set out in AID's NEPA regulations.[46]

It is not a significant extension of these precedents to reach S. 1045, and its proposal to add a new §106 to NEPA, providing that 120 days prior to a vote the US representative shall request an environmental assessment meeting the specifications of the CEQ for EIA of international financial activities. Nor is it much of an extension to include extraterritorial actions expressly under §102(2)(C) of NEPA. S. 1045 essentially asks the multilateral lending agencies to develop an EIA process, in consultation with CEQ, or face the likelihood that the US delegate would vote against a proposal. The US would make specialists available to help train the international lending agencies about EIA. The Treasury Secretary, with donors and borrowers, would develop guidelines on standards for projects affecting ecosystems such as in wetlands, moist tropical forests and savannas. Treasury and CEQ are to report to Congress on the progress made in developing EIA procedures in the international lending agencies.

This formula goes a long way toward integrating the economic engine of development with the analytic tool of EIA which helps assure sustainable development. As a major donor nation, the United States is responsible for the deployment of its funds through the World Bank and other multilateral development agencies. These bodies can do EIA as the US and some 35 other jurisdictions require already; most donor nations have enacted EIA legislation. Many borrower nations voted for the UNEP recommendations that they use EIA. There is no policy impediment, therefore, to MDBs establishing EIA procedures. Moreover, the legislation in §106(b) makes it clear that "internationally accepted criteria" will be used, and the findings indicate that the UNEP,[47] by the Organization for Economic Cooperation and Development,[48] and by NEPA experience will be drawn upon. Finally, the statute makes it clear that the MBDs must adopt and use EIA under their own rules, and that the US cannot unilaterally impose such rules.

S. 1045 is a strong step toward securing the rapid institutionization of EIA. It is a very welcome step. The Senate Committee on Environment and PUblic Works is to be commended for fashioning such farsighted legislation.

There are no substantial reasons to oppose S. 1045. The reason urged by those who dislike the approach of S. 1045 are that it (a) imposes US views on multilateral agencies, (b) lets Congress intervene in the executive's prerogative of managing foreign policy, and (c) makes too much work for the Treasury Department. Opponents do not dispute the need for EIA or the benefits derived therefrom. Opponents, especially those managers of civil servants in MBDs or the Treasury Department, quietly do seek to set up strawman arguments as surrogates for their own unwillingness to undertake EIA out of ignorance about EIA and a misinformed fear that EIA may grind their programs to a halt.

The first objection is misplaced. Every nation is under a duty to "take such measures as may be necessary, to the extent practicable under the circumstances, to ensure that activities within its jurisdiction and control...are conducted so as not to cause significant injury to the environment of another state or of areas beyond the limits of national jurisdiction."[49] The United Nations General Assembly has expressly stated that "activities which are likely to pose a significant risk to nature shall be preceded by an exhaustive examination; their proponents shall demonstrate that expected benefits outweigh potential damage to nature, and where potential adverse effects are not fully understood, the activities should not proceed."[50] Since multinational lending agencies are international bodies reflecting nations and their duties, and since the United Nations itself has urged EIA be used, S 1045 is no "dictate" from the U.S. Those who say that Congress is playing the "heavy" or "ugly American" are themselves failing to see that EIA is an accepted policy in most nations and in international "soft law." All that S. 1045 would do is accelerate the transition in the MBDs from giving lip service to environmental protection toward actually behaving in a manner which does protect the environment.

The second objection is out of touch with the role of Congress and the role of the Executive in the conduct of today's foreign relations. The Department of State has accepted NEPA procedures as a legitimate part of its foreign policy process for years.[51] As a panel of American Society of International Law concluded, "Total exemption of foreign affairs functions from administrative process is not justified. Many aspects of these functions are analogous to domestic issues now subject to process, the fact that they take on an international dimension does not necessarily or even probably mean that all forms of administrative process should be excluded. The recent experience of the Department of State in the environmental area demonstrates that foreign affairs issues involving international negotiation can be subject to hearings; a reasoned explanation of the decision can be made; and at least a partly public record can be offered without prejudicing efficiency, negotiating posture, or other national interests."[32]

Congress has always played a significant, constitutionally sanctioned role in foreign policy. As H. Bradford Westerfield puts it, "The broad problem is how to fashion a truly democratic control of the foreign relations of the United States in this period of its history."[33] He correctly notes that active participation of Congressional leaders from both parties is essential to the effectiveness of presidential leadership in foreign affairs. Since 1969 with the enactment of NEPA, Congress has led the Executive Branch in urging that environmental protection become a major component of US foreign policy. Given the deteriorating global environmental trends which led to TIME magazine's imperilled "Planet Of The Year" issue last January or the National Geographic Society's Centennial issue last year, this Congressional leadership is most worthwhile. As Edmund Burke put it, "We can never walk surely but by being sensible to our blindness." Congressional urging of EIA builds depth of vision as well as safeguards against environment blunders into our foreign policy institutions.

The Executive Branch may not hide behind the "necessity of state" rubric.[34] Clearly, the national interest, as set by Congress in its Clean Water Act, Clean Air Act, Endangered Species Act, NEPA, and other Environmental Laws, is to protect the environment. Since environmental degradation cannot be a secret, as TIME's editors show, there is no basis to claim a nationalistic prerogative when it comes to environmental protection. Congress has made the policy decision - and moral judgment - that the environment is to be protected. The debate over how.

Even the Founding Fathers were aware that Congress and the President would be conferring together on foreign policy; the diplomat, New York Governor and U.S. Chief Justice, John Jay observed in Federalist #64 that "the Constitution provides that our negotiations for treaties shall have every advantage which can be derived form talents, information, integrity, and deliberate investigations, on the one hand, and from secrecy and dispatch on the other."[35]

Congress has already dealt with the balance between democratic process and the need for delicate executive foreign policy leadership in shaping the Freedom of Information Act. FOIA does not apply to matters specifically authorized under criteria established by an Executive Order to be kept secret in the interest of the national defense or foreign policy;" where the Supreme Court in 1973 noted that Congress could certainly have provided that the Executive Branch adopt new procedures or it could have established its own procedures. ..." In 1974, Congress amended FOIA to provide the balanced process that now exists; the President by Executive Order, then established the procedural and substantive standards for disclosure.

Since NEPA and all EIA is basically a deliberate investigation of environmental impacts and a focused assembly of information by talented specialists, to assure an objective decision with integrity, in the fashion contemplated by John Jay. FOIA's precedent represents a consensus which Congress, the President and the Courts have hammered which is very suitable to EIA. You may wish to replicate that formula in including the extraterritorial actions among NEPA "actions."

"If our foreign policy is to truly national," said Henry Kissinger at his Senate confirmation hearings, "we must deepen our partnership with the American people. ... We must listen to the hopes and aspirations of our countrymen." It is of no account that a handful of federal bureaucrats would hide behind the president's authority to conduct foreign policy to avoid making the extra effort it takes to protect the environment. Congress has heard the deep seated American demand that we safeguard nature, conserve our natural resources, and protect the public health. It is time that Eximbank's, Treasury's, the State Department's and the President's partnership with the American people, and Congress, reflect that demand.

The third objection, that Treasury or Eximbank, or other Executive agencies have too much work to do to add EIA to their process is hardly worthy of comment. Suffice it to say that the U.S. Forest Service, Army Corps of Engineers, and dozens of other federal, state and local agencies, from California and Washington to New York and Massachusetts, now engage in EIA with substantially the same staffs as before. Properly implemented, EIA does not sap scarce staff time, it merely reorders it. Indeed, EIA allows for the identification of new efficiencies in agency conduct.

(2) CEQ - Revitalize the White House Office of Environmental Quality

The Council on Environmental Quality in the Executive Office of the President serves several critically important roles. It is not a line agency; CEQ can thus give independent advise to the President, OMB, and others regarding complex environmental issues, unencumbered by "turf" interests.

CEQ has several tasks crucial to NEPA. First, it promulgates the generic regulations which interpret NEPA in a neutral way (faithful to the Congressional intent and judicial interpretations), allowing line agencies to adapt those neutral directives to meet their own specialized needs. Second, it mediates inter-agency disputes on EIA issues; this is an important, often used, but little acknowledged role. Third, it assesses environmental trends and can engage in long-term forecasts.

The latter function is so significant that the former Deputy Assistant Secretary of State for Environmental Affairs, Lindsey Grant, urged a permanent institutionalization of the capacity to follow trends and foresee problems. He notes that trends like the greenhouse effect are lost in our system now; as he put it "basically, while we do environmental impact statements on every highway cloverleaf, we do not do them on the most fundamental things. ... Today we move at such a tremendous pace and make such basic decisions that we can change the nature of the earth before we realize it. ... We must make our decisions early. The best technique is a two-tiered system. Centered somewhere in the White House there should be a very small staff that is cut in on what is happening - that is, it has to be able to read traffic. It must have access to policy-players from various departments. Secondly, there must be some machinery for bringing together the people in government who are working on quantitative analysis. ... People in one government department do not know key people in other departments. ... Policy making can be greatly imported by making it possible for those involved in the technical decision-making process to examine more fully the likely results of their proposed actions."[63]

The need for global foresight capacity is widely acknowledged. In 1985, the leaders of environmental groups noted that "the most serious limitation in the United States' capability to address international issues of the future is the nearly total lack of any holistic, interrelated, long-term approach to decision-making. Events of the past decade have substantiated the conclusion of the 1980 Global 2000 Report to the President that the executive agencies of the U.S. government are not now capable of presenting the President with internally consistent projections of world trends for the next two decades. And nothing has happened since 1980 to improve the situation. ...An urgent need exists for the President and Congress to establish within the Executive Office of the President a mechanism for bringing long-range trends ... to the attention of decision-makers long before they reach crisis proportions."[64] These leaders in late 1988 made similar proposals to the Bush Administration;[65] they recommend that CEQ "be revitalized and re-built as a top priority for the new Administration."[66]

It does make sense to revitalize CEQ and use it for forecasting and advising, as well as for shepherding along the implementation of NEPA. The NEPA liaison system already puts CEQ in contact with all federal agencies as required by NEPA.[67] From a management view point, CEQ should have a single full-time chairman, who is its sole administrator; but it should also have an advisory council, comprised of 5-7 persons with expertise on environmental issues. These persons would be nationally recognized experts serving part-time. The environmental quality issues are too complex for a single chair alone; even to supervise a staff and advise the President, the chairman will need the credibility and wisdom which his discrete Council Members would provide. These persons would be a great asset to CEQ.

(3) The Supreme Court & NEPA

As the foregoing analysis demonstrates, NEPA has been widely incorporated into most U.S. federal agency conduct. Unfortunately, today's courts have eroded the early rigor which they recognized in Congress' §102(2)(c) EIS process ("to the fullest extent possible").[68] The D.C. Circuit in particular had articulated the "Hard Look Doctrine," in which agencies had to demonstrate that they took a hard look at environmental impacts by close scrutiny and selecting the combination of alternatives and mitigation measures which eliminated or minimized the adverse impacts.[69]

The U.S. Supreme Court concluded that this "hard look" gloss on judicial review under NEPA (arguably a higher standard than merely arbitrary and capricious), was not inherent in NEPA. The Supreme Court opined that the obligation in §102 that all agencies make a reasonable decision on the basis of a detailed written statement "to the fullest extent possible," did not justify the Hard Look Doctrine its 1978 Vermont Yankee ruling.[70] All that the U.S. Supreme Court chose to find that Congress wanted out of NEPA was a full disclosure law, and that the Courts should require agencies to do nothing more.

Nonetheless, perceptive appellate judges saw in NEPA a Congressional intent not just to disclose environmental impacts, but to motivate agencies to minimize or avoid those impacts. Chief Judge Oakes of the Second Circuit Court of Appeals has defended the "hard look doctrine" as a valuable part of NEPA.[71] The late Judge Leventhal explained the value of the doctrine in a law review article thus:[72]

> "The common theme one can draw from these observations on the role of the courts in environmental mattes is the court's central role of ensuring the principled integration and balanced assessment of both environmental and nonenvironmental considerations in federal agency decision-making. The rule of administrative law, as applied to the congressional mandates for a clean environment, ensures that mission-oriented agencies...will take due cognizance of environmental matters. It ensures at the same time that environmental protection agencies will take into account the congressional mandate that environmental concern be reconciled with other social and economic objectives of our society."

The CEQ regulations[73] are outstanding as a set of rules for their clarity and ease of use. Former CEQ General Counsel Nicholas Yost conducted nationwide hearings and extensive inter-agency consultations to develop these regulations. They are a model for our states and are even used by foreign nations. The regulations require a study of impacts and alternatives and oblige an agency to "rigorously explore and objectively evaluate all reasonable alternatives"[74] and to "include appropriate mitigation measures not already included in the proposed action or alternatives."[75] CEQ has explained that "mitigation measures must be considered even for impacts that by themselves would not be considered 'significant'. Once the proposal itself is considered as a whole to have significant effects, all of its specific effects on the environment (whether or not 'significant') must be considered and mitigation measures must be developed where it is feasible to do so."[76]

What the CEQ regulations attempt to do is to be faithful to the goals of §101 of NEPA and to advance sound environmental decision-making in §102(2)(C) by obliging agencies to show that they consider least harmful alternatives and explain why they select the alternatives and mitigation measures they choose. All that the "hard look" doctrine did was to assure that in "close questions" the Court would find that the agency should take the harder look, do an EIS rather than merely an EA; for an issue such as global warming, it is not clear that the "hard look" doctrine alone would result in an agency doing the further analysis, but it would certainly help.

In May, 1989, the U.S. Supreme Court decided two cases which dilute NEPA's duty to examine mitigation and to opt for effective mitigation measures or provide a reasoned explanation of why the agency found it was unable to mitigate.[77] In Robertson v. Methow Valley Citizens Council, the Court held that NEPA did not require a fully developed plan to mitigate environmental harm. Justice Stevens noted that "simply by focusing the agency's attention on the environmental consequences of a proposed project, NEPA ensures that important effects will not be overlooked or underestimated only to be discovered after resources have been committed or the die otherwise cast."[78] He notes that while an agency still should take a "hard look" at environmental consequences, the U.S. Supreme Court in Vermont Yankee and the later Stryckers Bay decision[79] has decided "that NEPA itself does not mandate particular results, but simply prescribes a necessary process."[80] He notes that "NEPA merely prohibits uninformed - rather than unwise - agency action."[81] In so holding, the Court reverses the 9th Circuit Court of Appeals ruling below that "NEPA requires that 'action be taken to mitigate the adverse effects of major federal actions' 833 F.2d at 819...and that this substantive requirement entails the further duty to include in every EIS a detailed explanation of specific measures which will be employed to mitigate the adverse impacts of a proposed action,' 833 F.2d at 819."[82]

This ruling will mean that once agencies recite a *prima facie* list of possible mitigation measures or alternative actions, they can (and probably will)[83] do as little as necessary to adopt the most efficacious mitigation measures. They will certainly avoid providing a reasoned explanation for their choice among these measures.

The Supreme Court distinguishes NEPA from the Endangered Species Act[84] which clearly imposes substantive obligations ("ensure that any action...is not likely to jeopardize the continued existence of any endangered species or threatened species").[85] What the Supreme Court seems to be saying is that unless Congress amends NEPA to require a reasoned choice of mitigation, the Court will not read this duty into NEPA. Mr. Justice Brennan separately concurs expressly to highlight the rule that "one important ingredient of an EIS is the discussion of steps that can abe taken to mitigate adverse environmental consequences."[86] Clearly, Mr. Justice Brennan feared an erosion of the effectiveness of the mitigation process.

In fact, the Supreme Court since Vermont Yankee has shown hostility toward NEPA. Professor Davis has attacked the softening of the "Hard Look" Doctrine on administrative law grounds.[87] It would appear that the Court is awaiting Congress' response.

Marsh v. Oregon Natural Resources Council,[88] confirms this evaluation. The Court, again by Justice Stevens, declines to hold that NEPA requires a complete mitigation plan, and examines when information emerging after completion of an EIS requires preparation of a supplemental EIS. The Court requires the continued analysis which a supplemental EIS provides, and notes that "NEPA does require that agencies take a 'hard look' at the environmental effects of their planned action even after a proposal has received initial approval."[89] The Court uses the mere "arbitrary and capricious" standard of review to test the agencies "look." Thus, while the Court employs the brittle shell of the words "hard look," nothing is left of the Hard Look Doctrine itself. Even a "searching and careful" judicial review is likely to defer to agency expertise, as Justice Ginsburg did for the "close question" in the NHTSA CAFE standards decision of the D.C. Circuit Court of Appeals.[90]

The best evidence of the erosion of the EIS process is in the ruling of the Supreme Court on the merits in Marsh:[91]

> "There is little doubt that if all of the information contained in the Cramer Memorandum and SCS survey was both new and accurate, the Corps would have been required to prepare a second supplemental EIS. It is also clear that, regardless of its eventual assessment of the significance of this information, the Corps had a duty to take a hard look at the proffered evidence. However, having done so and having determined based on careful scientific analysis that the new information was of exaggerated importance, the Corps acted within the dictates of NEPA in concluding that supplementation was unnecessary. Even if another decision-maker might have

reached a contrary result, it was surely not "a clear error of judgment" for the Corps to have found that the new and accurate information contained in the documents was not significant and that the significant information was not new and accurate. As the SIR demonstrates, the Corps conducted a reasoned evaluation of the relevant information and reached a decision that, although perhaps disputable, was not arbitrary or capricious."

The point of NEPA is not to enshrine the analysis of office-holders, but to both require that they inform themselves about environmental impacts *and* that they disclose their informed decisions *and* that they elect decisions which reasonable persons would find "to the fullest extent possible" do, in fact, militate toward environmental protection. The Supreme Court only requires the information step. With all due respect to the Supreme Court, the 9th Circuit Court of Appeals in *Marsh* did not "second guess" the judgment of the Army Corps of Engineers, rather it simply sought to require that the Corps actually employ the facts disclosed about adverse environmental impacts to avert those impacts.

By eliminating most of the rigor from NEPA's procedural regime, the Supreme Court has discounted Congress' initial statutory language in NEPA. The original statute bears recalling:

Section 2: The purposes of this Act are to...promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man...."**

"§101.(a) The Congress...declares that it is the continuing policy of the Federal Government...to use all practicable means and measures...in a manner calculated to foster and promote the general welfare, to create conditions under which man and nature can exist in productive harmony..."

and

§102. The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this Act."**

While these Congressional policy directives seem clear on their face, they have been routinely neglected by the Supreme Court in its selective reasoning which held NEPA to be purely procedural. The Court did not explain the statutory basis for its ruling in *Vermont Yankee*, nor in its *per curiam* *Stryckers Bay* holding. If Congress wants its original NEPA policies to be given effect, it will have to amend NEPA to do so.

Two suitable amendments would be as follows:

I. Section 102(2)(C) of the National Environmental POlicy Act, as amended (42 U.S.C. 4341 et seq.) is amended to strike clause (iii) and insert in lieu thereof "(III) alternatives to the proposed action that achieve similar public purposes, and insure that the action is likely to avoid, minimize or compensate for the adverse impacts described in clause (ii), and the reasons for selecting the measures which avoid or mitigate the adverse impacts,"

II. A new Section 103 is added to the National Environmental Policy Act and Section 103, 104 and 105 are renumbered accordingly, to provide as follows:

"Section 103. The standard of judicial review for any action of an agency of the federal government with respect to compliance with §102(2)(C) of the National Environmental Policy Act shall be to assure procedural rigor to fulfill the environmental protection policies of §101 of the National Environmental Policy Act and to ensure that the agency has taken a hard look at the salient environmental problems and engaged in reasoned decision-making."

The effect of new amendments such as these would be to compel the full evaluation of all significant impacts. "Close questions" would be answered erring on the side of environmental protection. Suitable mitigation alternatives would be genuinely assessed and a meaningful choice selected. While not dictating any specific substantive outcome for agency decision-making, the revised NEPA §102 would give effect to NEPA's §101, and the new §103 would reinstate the position on judicial review used by the Ninth Circuit Court of Appeals in Robertson and Marsh, and the Second Circuit in the view of current Chief Judge Oakes, and the D.C. Circuit in the views of the late Judge Leventhal. Congress would do a great service to advance holistic and systemwide environmentally sound decision-making by adopting such revisions.

D. Propose New NEPA Amendments

Draft NEPA amendments similar to H.R. 1113 are under consideration for possible use before this Committee, as part of the authorization of appropriations for the Office of Environmental Quality. These amendments would make several valuable improvements to NEPA:

(1) Extraterritoriality: It is proposed to include "extraterritorial actions" as "actions." I testified in favor of such a provision last year, and respectfully refer you to that testimony.** There is no reason why agencies must evaluate environmental impacts for agency action at home and not abroad. The opposition to doing so urges that the U.S. would be interfering in the domestic affairs of others. No reason is given to avoid EIA on the commons of the high seas or atmosphere. Of course, for the U.S. to deliberately or negligently harm that state's environment abroad (even at the invitation of another nation) is contrary to NEPA and would be interfering in another state's internal affairs to the extent the U.S. unintentionally harms its environment. Under International Law, the U.S. would be liable for that harm, even if

unintentional.[**]

The point is one I have made before. It is a U.S. duty not to intentionally or unintentionally harm the environment outside its jurisdiction. The only way to ensure that we observe this duty is to undertake suitable EIA.

I would leave out the proposed clause in parenthesis on national security, and use instead FOIA's analogous language.[**] The FOIA analogy would "(A) exempt actions specifically authorized under criteria to be established by an Executive Order, on recommendation of the Council on Environmental Quality to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive Order." Use of FOIA language simplifies implementation since most relevant issues have already once been explored by Congress and the President, and examined by the Courts.

(2) Mitigation - I would endorse the proposed amendment to §102(2)(C)(iii). (It is preferable to the text in H.R. 1113 for the reasons set forth above. I would urge use of the post EIA audit, which could be encompassed in analysis of "the effectiveness of those implemented mitigation measures." This is an excellent addition, as explained above.

(3) Annual Report - It is useful to require that CEQ report on agency EIA compliance in its Annual Report to Congress. CEQ is presently very tardy in tendering these reports; EPA should be also obliged, under §309 of the Clean Air Act, to get its data to CEQ for use in the Annual Report to Congress.

(4) CEQ Authorization - CEQ should have ample funds to perform both the NEPA oversight and the long range forecasting discussed above. While agencies may look at incremental, cumulative impacts (such as the role the CAFE standards have in greenhouse warming), if Congress re-emphasizes and re-instates the Hard Look Doctrine, many long term trends may be hard to pick out in the specific context of an agency action. The CEQ should be given such a role.

It is useful to clarify CEQ's duty to promulgate regulations, and in particular to direct that CEQ provide guidance on cumulative impacts and global concerns. The required guidelines of statistically significant sample of EISs is very welcome. This has not been undertaken for over a decade, and is long overdue. Such an analyses of EIA conduct was urged by participants at the West Point Conference.

Conclusion

The foregoing analysis indicates that there is much for Congress to do to strengthen NEPA and its mandates. The amendments under consideration will do much to assure that the United States integrates environmental protection fully into its foreign policy programs and objectives. There is no sound reason why the multilateral development banks should not warmly embrace EIA, nor why all U.S. federal agencies should not undertake EIA for their extraterritorial actions. Finally, there is no reason why the Congressional decision in 1969 to create a Presidential Office of Environmental Quality should not be revisited and made more effective.

It is ironic that some federal executive agencies would still resist EIA as an effective means of ecological stewardship at the very moment when multinational corporations are becoming environmental leaders. As the Chairman of du Pont said to the American Chamber of Commerce (UK) in London last May 4, 1989, "Environmentalism is now a mode of operation for every sector of society - industry included," (See attached text). Apparently governmental officials lag behind both du Pont, the Sierra Club, and foreign leaders such as the British Prima Minister in becoming environmentalists.

We face unprecedented international environmental problems: sea level rise, stratospheric ozone depletion, desertification, greenhouse effect, tropical and temperate deforestation, species extinction and the loss of biological diversity, and an exponential rise in the world's population. No one agency or office alone can cope with these trends. A systemwide process of ecological stewardship is required.

Congress, with great creativity and perspicacity, created a systemwide process when it invented environment impact assessment. It is not enough that legislatures around the world pay tribute to Congress implicitly in enacting their own EIA procedures. Congress needs to tighten up its NEPA process, to regain U.S. international leadership in advancing global environmental protection. The time to act is now. This Subcommittee, and the entire Committee on Environment and Public Works, are providing extraordinary service by this endeavor to revise and improve the NEPA process.

Thank you for your attention to this testimony. I trust that it is useful and am prepared to supplement it as you may require.

Annotations To Testimony

1. 42 U.S.C. 4321, et seq.

2. See Chapter 4 in Robinson, ENVIRONMENTAL REGULATION OF REAL PROPERTY (New York Law Journal - Seminars Press, NY); and Robinson, "Extraterritorial Environmental Protection Obligations of The Foreign Affairs Agencies: The Unfulfilled Mandates of NEPA," 7 N.Y.U. J. INT'L. L. & POL. 257 (1974).

3. I have practiced in New York with Marshall, Bratter, Greene, Allison & Tucker and currently with Sive, Paget & Reisel. Both firms have participated in numerous federal Environmental Impact Statement procedures.

4. Article 8, New York Environmental Conservation Law; see generally the symposium in 46 ALBANY L. REV. (1982) and the articles in 5 PACE ENVIR'L L. REV. (1987); as General Counsel of the NYS Department of Environmental Conservation (1983-85), I was responsible for legal interpretations of New York's "Little NEPA."

5. See generally Robinson and Waxmonsky, "The US-USSR Agreement To Protect Environmental Protection: 15 Years of Cooperation," 18 ENVIR'L L. 403 (Lewis & Clark, 1988).

6. See UN ECE Restricted Seminar on Environmental Impact Assessment, Warsaw, 30 March 1987 (ENV/SEM. 17/R 13).

7. Hearing June 16, 1988, of Subcommittee on Hazardous Waste & Toxic Substances, Senate Committee on Environment and Public Works.

8. N.A. Robinson, Ed., ENVIRONMENTAL IMPACT ASSESSMENT (N.Y.S. Bar Association, 1989).

9. L.K. CALDWELL, SCIENCE AND THE ENVIRONMENTAL POLICY ACT at 150-151 (University of Alabama Press, 1982).

10. Australia: See E.M. Anderson, ENVIRONMENTAL IMPACT ASSESSMENT IN AUSTRALIA AND OVERSEAS (Aust. Dep't. of Arts, Heritage & Environment, 1986).

11. Canada: See B. Sadler (Ed.), AUDIT AND EVALUATION IN ENVIRONMENTAL ASSESSMENT AND MANAGEMENT: CANADIAN AND INTERNATIONAL EXPERIENCE (Environment Canada, Ottawa, 1987).

12. See EEC Council Directive of 27 June 1985, "On the assessment of the effects of certain public and private projects on the Environment," 85/337/EEC 175 J. Official EEC 41 (7 July 1985).

13. N.Z.: see D.A.R. Williams, Chapter VIII on "Environmental Impact Assessment and Reporting," in ENVIR'L L. at 234, 237-8 (Butterworths, Wellington, N.Z. 1980).

14. See ASEAN Agreement on the Conservation of Nature and Natural Resources, Article 14 on "Impact Assessment," reprinted in 15 ENVIR'L policy & l. 64-69 (1985).

15. On the Soviet system of "Ecological Expertise" see N.A. Robinson, "Perestroika and Priroda: Protection of the Environment in the USSR," 5 PACE ENVIR'L L. REV. (1988).

16. UN ECE: "Report of the Ad Hoc Meeting to Elaborate A Draft Framework Agreement on Environmental Impact Assessment In A Transboundary Context," EN WA/A.C. 3/2 (27 October 1988).

17. "Goals and Principles of Environmental Impact Assessment," Agenda Item 10, UNEP Governing Council, 14th Sess., 17 June 1987, Decision 12/25.

18. *Op. cit.*, *supra* note 8, "The Department of The Army and NEPA," at 19. Among Secretary Doyles' examples of the utility of NEPA is one from my own State, the selection of Fort Drum for stationing the 17th active component division.

19. *Op. cit.*, *supra* note 8, William Dickerson, "The Theory and Practice of EIA: A Look At The Adequacy of Federal EISs," at 55-59.

20. §309, Clean Air Act, 42 U.S.C. 7609.

21. *Op. cit.*, *supra* note 8, B. Blanchard, "Administrative Agency Restructuring Necessary for Environmental Assessment, at 62-63.

22. 40 C.F.R. §1505.3.

23. *Op. cit.*, *supra* note 11.

24. The CEQ regulations supplanted earlier guidelines issued by CEQ at 38 Fed-Reg. 20550-20562 (1973). They appear at 40 C.F.R. Part 1500. The U.S. Supreme Court noted the NEPA regulations of CEQ, and observed that "CEQ's interpretation of NEPA is entitled to substantial deference," in *Andrus v. Sierra Club*, 442 U.S. 347 (1979). Some lower courts and agencies still confuse the guidelines with the regulations. Congress should direct compliance with CEQ's regulations as now codified and hereafter amended.

25. §102(2)(F), NEPA.

26. *Sierra Club v. Coleman*, 405 F. Supp. 53, 421 F. Supp. 63, 6 ELR 20799 (D.d.C., 1976), *aff'd*. *sub nom*. *Sierra Club v. Adams*, 578 F. 2d 389 (D.C. Cir., 1978).

27. The Secretary of State, "Statement on the Panama Canal Treaties and Environmental Protection," Hearings Before the Subcommittee on the Panama Canal, Committee on Merchant Marine and Fisheries, House of Representatives, 96th Congress, Serial No. 96-2, Part 2, pp. 1657-1659 (1979).

28. See "The Canal Treaties To The Rescue?" N.Y. TIMES editorial, p. A30 (May 26, 1989).

29. *Sierra Club v. AEC*, 4 ELR 20885 (D.D.C. 1974); *EDF v. AID*, 6 ELR 20121 (D.D.C. 1975); *People of Saipan v. Interior*, 356 F. Supp. 645 (D. Ha. 1973), *aff'd*. as modified 502 F.2d 90 (9th Cir., 1974); *People of Enewatak v. Laird*, 353 F. Supp. 811 (D. Ha. 1973); *NORMAL v. State Dep't.*, 452 F. Supp. 1226 (D.D.C. 1978); *NRDC v. NRDC*, 647 F.2d 1345 (D.C. Cir., 1981).

30. *Wilderness Society v. Morton*, 463 F.2d 1261 (D.C. Cir., 1972).

31. *Id*. at 1262-63.

32. See "Planet In Peril" TIME (January 2, 1989).

33. Matthew L. Wald, "A Challenge To Gasoline: Fuels Lower in Pollutants," N.Y. TIMES, p. A1 (April 7, 1989).

34. 53 Fed. Reg. 39275.

35. Comments of NRDC in NHTSA Docket No. FE-88-01; Notice 2 (Oct. 27, 1988). NRDC comments as follows:

36. *NRDC v. NATSA*, No. 88-7434, *Competitive Enterprise Institute v. NHTSA*, No. 89-70011 (9th Cir., CA), removed to D.C. Circuit where both are pending under Docket No. 89-1277.

37. *Public Citizen, et al v. NHTSA*, 848 F.2d 256 (D.C. Cir., 1988).

38. *Id.*, at 268.

39. S. 1045 is set out in CONGRESSIONAL RECORD S. 5647-49 (May 18, 1989).

40. *Op*. *cit*., *supra* note 7.

41. See WCED Report, OUR COMMON FUTURE (Oxford University Press 1988).

42. *Id*., at 321-2.

43. *Id*. at 338.

44. Statement of William K. Reilly, Before the Subcommittee on Hazardous Wastes and Toxic Substances, Senate Committee on Environment and Public Works (June 16, 1988).

45. FOIA, 5 U.S.C. §552.

46. 22 C.F.R. Part 216.

47. *Op*. *cit*., *supra* note 17.

48. EIA Measures Recommended by the Council of the OECD, 646th Meeting, October 1986.

49. §601 Restatement of The Foreign Relations Law of The United States (Restatement Third, American Law Institute, 1987). See citations assembled therein.

50. World Charter of Nature, U.N.G.A. Res. 37/7.

51. 11 *Foreign Affairs Manual*, Chapter 700.

52. F.O. Wilcox and R.A. Frank, *The Constitution and the Conduct of Foreign Policy*, (ASIl, 1976) at pp. 75-76.

53. H.B. Westerfield, Foreign Policy & Party Politics: Pearl Harbor to Korea, at p. 3 (Yale University Press, 1955).

54. See generally the discussion over necessity of state, which is at least as ancient as Machiavelli's *The Prince*, in H.K. Jacobson (Ed.), *America's Foreign Policy* (Random House, 1965) at 75-77.

55. *The Federalist Papers* (Clinton Rossitor, Intro. and Ed.), at 393 (Mentor Book, New Am. Library, 1961 edition).

56. 5 U.S.C. 552; State Department FOIA procedures are at 22 C.F.R. 6 and 212.

57. 5 U.S.C. 552(b)(1)(A).

58. *EPA v. Mink*, 410 U.S. 73 (1973).

59. E.O. 12065, 3 C.F.R. 190.

60. Congress had to override the veto of President Ford of the 1974 FOIA amendments, which illustrates the vigor with which the officials in the Executive Branch have resisted these sorts of Congressional innovations in the past. See generally *Ray v. Turner*, 587 F.2d 1187, 1192-3 (D.C. Cir., 1978).

61. Senate Committee on Foreign Relations, Hearings on the Nomination of Henry Kissinger to be Secretary of State, 93rd Cong., 1st Sess., Part 1, at 10 (1973).

62. See generally the West Point Conference proceedings, *supra* note 8.

63. L. Grant, "Foresight Capability: The Unexpected REsults on Our Actions," in *Science, Technology and Foreign Affairs* (Foreign Service Institute, U.S. Department of State, 1984) at 11-13.

64. R. Cahn (ed.), *An Environmental Agenda For The Future* (Agenda Press, WAshington, D.C., 1985) at p. 141.

65. T. Allan Comp., Blueprint for the Environment: A Plan for Federal Action (Howe Bros., Salt Lake City, 1989), at 323: "With environmental crises threatening to overwhelm the planet (e.g. global warming), the federal government needs to have a policy unit in the White House which focuses on these issues and which can help the President develop policy and initiatives."

66. *Id*. at 323.

67. See the inventory of federal agencies with environmental quality expertise in 49 Fed. Reg. 49750-49782 (December 21, 1984).

68. See generally Frederick Anderson, NEPA In The Courts (Johns Hopkins University Press, 1973).

69. See, e.g., Circuit Judge Harold Leventhal's decision in *Greater Boston Television Corp. v. FCC*, 444 F.2d 841 at 850 (D.C. Cir., 1970), cert. den. 403 U.S. 923 (1971).

70. *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519 (1978).

71. J. Oakes, "The Judicial Role in Environmental Law," 52 N.Y.U.L. REV. 498 (1977).

72. Leventhal, "Environmental Decision Making and the Role of the Courts," 122 U. PA. L. REV. 509 (1974) at 604.

73. 40 C.F.R. Part 1500.

74. 40 C.F.R. §1502.14(a).

75. 46 Fed. Reg. 18026 at 18031-32 (March 23, 1981), Question 19a in 40 Most Asked Questions About NEPA.

76. *Robertson v. Methow Valley Citizens Council*, Docket No. 87-1703, 57 U.S.L.W. 4497, and *Marsh v. Oregon Natural Resources Council*, Docket No. 87-1704, 57 U.S.L.W. 4504 (May 1, 1989).

77. 57 U.S.L.W. 4497 at 4501.

78. *Stryckers Bay Neighborhood Council v. Karlen,* 444 U.S. 23, 227-228 (1980, *per curiam*).

79. 57 U.S.L.W. at 4501.

80. 47 U.S.L.W. at 4502.

81. *Id.*

82. 16 U.S.C. §1536(a)(2).

83. For a skeptical, if somewhat dated, view of how agencies avoid complying with NEPA, see J. Sax, "The (Unhappy) Truth About NEPA. 26 OKLA L. REV. 239 (1973).

84. 57 U.S.L.W. at 4502, Fn 14.

85. 57 U.S.L.W. at 4504.

86. 1 K. DAVIS, ADMIN. L. TREATISE 609 (2d Ed., 1978) and §6.37 (Supp. 1980).

87. 57 U.S.L.W. at 4508.

88. *Supra* note 37.

89. 57 U.S.L.W. at 4511.

90. P.L. 91-190, January 1, 1970.

91. 42 U.S.C. 4321-22.

92. *Op. cit.*, *supra* note 7.

93. Corfu Channel Case (United Kingdom v. Albania) [1948] I.C.J. Rep. 15.

94. See 7 N.Y.U.J. INT'L. L. & POL. 257 (*supra* note 2 and response by A. Dan Tarlock, "The Application of The National Environmental Policy Act of 1969 to the Darien Gap Highway Project," 7 NYU J. INT'L. L. & POL. 459 (1974).

95. 5 U.S.C. §552(b)(1).

96. *Op. cit.*, *supra* note 8.

ATTACHMENT TO TESTIMONY OF PROF. NICHOLAS A. ROBINSON

Remarks by

E. S. Woolard

Chairman, E. I. du Pont de Nemours and Company

before the

American Chamber of Commerce (UK)

London — May 4, 1989

I'm very pleased to be here today, and I am especially pleased to have been asked to speak on environmental challenges to industry.

The subject is timely for two reasons. The first is that I began my tenure as Du Pont's chairman only last week. And as I look ahead to the challenges Du Pont faces in the next decade and beyond, I see one of our chief concerns being environmental stewardship. An unexpected turn of events in the environmental arena — be it an accident or the cumulative effects of regulatory or policy developments — could derail progress toward the vision of the kind of corporation we want Du Pont to be in the next century. I must make every effort to ensure that doesn't happen.

The second reason why my talk today is timely is that no one could have anticipated that between the time I was invited to speak and now the U.S. would suffer one of the worst environmental mishaps in its history. The oil spill in Alaska and the ensuing environmental disaster have shocked the North American community. But I can honestly say that the wreck of the Valdez did not alter the content of what I am going to say to you today — only the emphasis with which I say it.

That's because the environmental issues that industry faces around the world are at this point pretty clear cut. The Valdez spill did not fundamentally change the issues, rather it demonstrated again that avoiding environmental incidents remains the single greatest imperative facing industry today.

This realization has been too slow in coming, including to my own company. The real environmental challenge is not one of responding to the next regulatory proposal. Nor is it making the environmentalists see things our way. Nor is it educating the public to appreciate the benefit of our products and thus tolerate their environmental impact and that of the processes used to make them.

Clearly industry has to participate in the political process to oppose poor policies and support well-crafted initiatives. (Du Pont, for example, supports U.S. Congressman Howard Wolpe's bill that would encourage waste minimization and recycling.) And while we may not agree on many points, industry and environmental groups need ongoing dialogue. And industry will always have a moral and economic responsibility to assist the public in understanding risk-benefit issues.

But let me state plainly the fundamental environmental challenge to companies like Du Pont: Our continued existence as a leading manufacturer requires that we excel in environmental performance and that we enjoy the non-objection — indeed even the support — of the people and governments in the societies where we operate around the world. In other words, what's at stake is the ability of much of our present manufacturing industry to continue to serve well the growing needs of society.

Environmentalism is now a mode of operation for every sector of society — industry included. We in industry have to develop a stronger awareness of ourselves as environmentalists. I am personally aware that as Du Pont's chief executive, I'm also Du Pont's chief environmentalist.

I will probably never be in agreement with all that Greenpeace or the Green Party believes. And I don't think for a minute that by adopting a more proactive environmental attitude we're going to see the criticism of industry by activists disappear. In fact, it is probable that as industry becomes more proactive, environmental groups may become more extreme in their positions in order to maintain their identity. In any case, there will continue to be numerous cases of controversy and many situations in which reasonable people can disagree.

But at the same time there are points where our interests are the same, and we in industry in no way compromise our responsibility to shareholders when we admit it. We should seek out those opportunities to align ourselves with the environmental community and demonstrate where environmental and industrial goals are compatible.

In other words, I'm calling for corporate environmentalism — which I define as an attitude and a performance commitment that place corporate environmental stewardship fully in line with public desires and expectations.

What historically has stood in the way of corporate environmentalism becoming a reality?

First, our corporate insensitivity to public opinion has gotten in the way. For a long time there was a perception in industry that environmentalism was somehow a fringe activity, out of step with the mainstream of society. Beyond the small population of executives who dealt with environmental issues, many manufacturing executives saw environmentalism as a nuisance and environmentalists as radicals of one variety or another. But the most powerful environmentalist group in every modern society is now the general public which has declared in opinion polls and in elections that the environment will be protected. Last month *The Economist* reported that when West Germans were asked in a recent poll what worries them most, twice as many said pollution as said unemployment. In another story last month, The *Financial Times* reported that 70 percent of the Dutch people would forego a higher standard of living for a cleaner country. Environmentalism is the mainstream.

The second thing that's gotten in the way of developing a legitimate corporate environmentalism is industry's lack of credibility. It has probably never been lower than it is right now in the wake of the Valdez accident. I recall one headline in a major metropolitan daily that ran an editorial the week after the spill. The headline read "Trust us, they said." We can expect to hear echoes of that for a long time to come.

How do we build credibility? One thing is certain: Credibility is directly tied to performance. We must adopt even greater safeguards to avoid incidents. When problems do occur, we must swiftly and effectively respond. The Alaskan oil spill is stark evidence of this reality.

Communication is critical to the success industry will have in dealing with environmental problems. But communication is only beneficial if we back up what we say with concrete action. An example of where the chemical industry has been innovative in this regard is with the Responsible Care programs that began in the Canadian chemical industry and which have since been adopted by U.S. chemical companies.

The third obstacle that can get in the way of our becoming corporate environmentalists is the technocracy of modern industrial corporations. Science and technology are marvelous things. No one knows this better than those of us who work at Du Pont where we have witnessed the many good things that science and engineering make possible in our lives.

But the flip side is that we sometimes position ourselves on an environmental issue on the basis of available technical or scientific data alone. We have been too inclined to act as though public wishes and concerns matter less than the technical opinions of scientists and engineers. But in fact public opinion must be dealt with regardless of the technical facts.

I don't mean to say that industry should roll over and play dead every time someone makes a protest. The recent scare in the U.S. over a chemical growth regulator used in apples points out that economic decisions should not be made on the basis of an alarmed public's reaction to overstated news stories. But neither can they always be made solely on the technical merits. There is a point at which every company should have the good sense to know whether persisting with a particular position is in the best interest of society at large, whatever the technical merits of the argument. To develop the understanding of when that point is reached will require a new corporate sensitivity to public concerns, and an opening of new channels of communication with the public.

We will also have to change some corporate attitudes. For example, the truly farsighted manager will not spend just what is necessary to meet minimum technical requirements of the law. Where reasonable improvements can be identified that will bring long-term environmental benefits and enhance public acceptance, we must have the vision to implement such changes — even at cost penalties beyond what is necessary for mere compliance.

Some examples from Du Pont's own experience point to what I mean. We used to dispose of inert wastes from one of our manufacturing sites into the Atlantic Ocean off the coast of the state of New Jersey. Two years ago, our government permit to continue this ocean disposal was up for renewal. For many months prior to the expiration of the permit we had not been using ocean disposal, and looking ahead we felt that we would probably not use this disposal technique — even though some of the alternatives are more expensive. Clearly we had some misgivings about reapplying, but we went ahead anyway, attempting to renew our disposal permit in spite of public objections. Why? Because the technical data supported our position. The materials we were disposing of did not harm marine life.

But in hindsight, we can see that we weren't sensitive enough to the views of the people living on the New Jersey coast. They didn't care about our technical data. They oppose ocean disposal of any sort because their coastal region represents a valuable economic resource as well as a recreational area. That opposition is now part of their total outlook. I'm pleased to say that before the government acted on our renewal request, we made the right decision and withdrew our application. But we could have spared ourselves a lot of negative publicity had we withdrawn our request earlier — or not reapplied in the first place.

Our response to the ozone protection issue was a different matter. Let me say right off that, as the world's largest manufacturer of CFCs, there was a whole lot more at stake in the CFC issue than in the ocean disposal case. Here we were talking about a very important business with annual sales of approximately $750 million. Also we were dealing with a product of enormous utility throughout the world for which, in contrast to the ocean disposal situation, real alternatives did not exist.

We followed the CFC/ozone depletion issue since its introduction as a plausible, though untested, scientific theory first published by Molina and Rowland in 1974. As early as 1975 our then chairman Irving Shapiro stated that if there was credible scientific evidence of harm to the environment, we would cease manufacturing these materials. The scientific case was slow in building — some data refuting, some supporting the assertion. But during the next ten years it became apparent that a case for damage to the atmosphere could be made. In 1986 we led industry support of international negotiations that resulted in the Montreal Protocol with its provisions for cutbacks that at the time appeared to provide a margin of safety.

The CFC story could have ended there, but it didn't. The ink on the Montreal agreement was barely dry when the National Aeronautics and Space Administration Ozone Trends Panel announced new scientific findings. At this point we had seen enough. Although an argument could have been made to stick with the Montreal timetable and get more data, we decided that our own desire to do the best thing for the environment pointed to one course of action: taking a leadership role by committing to a complete phase-out of fully halogenated CFCs by no later than the turn of the century. From the time we got the NASA data it took us only 72 hours to chart a completely new course which we announced to the world a few days later.

We followed up on that announcement with action. We continue to work for international solutions to the problem. This week our representatives are among the group meeting in Helsinki to discuss strengthening the Montreal Protocol to include a worldwide phaseout of the same compounds Du Pont has promised to eliminate. Clearly, any phaseout must occur in concert with an orderly transition to alternative products. To accomplish this, we have six operating pilot facilities and an interim commercial scale plant under construction in Texas. In addition, we are announcing today the construction of a commercial facility at Humberside to serve the European aerosol market. The Humberside plant will manufacture dimethyl ether to replace CFCs used in aerosols. The compounds are safe in use and have no impact on the ozone layer and do not contribute to global warming.

Overall, Du Pont's action on CFCs was a sensitive response to a world need. It was a credible response, because we were fulfilling the pledge made by Mr. Shapiro, which was based on our corporate environmental policy, and we were continuing the company's historical commitment to our employees regarding the safety of the products we manufacture. And it was an example of where we used technical data to initiate a remedy rather than to delay action. I like to think that a response of that nature represents the basic ethic of our company, and it is that ethic — one of corporate environmentalism — that will guide our future actions.

What will those future actions be? Well, we cannot sit around and wait for events to drive us. We have developed a corporate agenda for environmental leadership for the next decade. I'd like to outline for you today some of the goals we will accomplish by the end of the next decade or before:

- Du Pont manufacturing facilities have had a goal of 35 percent reduction at the source of total hazardous waste by 1990. We expect to make that goal. But we won't stop there. Du Pont will accelerate those efforts and at least duplicate that level of progress during the next decade. Waste reduction will be one of Du Pont's primary technical objectives during the 1990s.
- Du Pont will manage at least 1,000 square miles of land to enhance the habitat for wildlife, with a special emphasis on wetlands.
- Du Pont will eliminate heavy metal pigments used in the manufacture of some plastics.
- Du Pont will take an increasing responsibility for the efficient and environmentally acceptable disposal of the plastic portion of the global solid waste stream. Just last week we announced a joint venture with Waste Management, Inc., the largest waste management firm in the world, to reclaim and recycle high-value polymers from municipal wastes. Our first plant will start up early next year.
- Du Pont has often included community representatives in discussions of present and planned local plant operations. We will extend this practice to all manufacturing sites and involve community representatives in all major planning activities relevant to public health or the environment.
- Finally, Du Pont has for some time considered environmental performance — both pro and con — in determining compensation of company managers. We will make this procedure more direct and formal for executives from middle management to senior officers of the company.

These goals are by no means exhaustive. As time and resources permit, we will consider adjusting them or adding new ones.

Behind all these commitments is our objective to make Du Pont one of the world's most environmentally sound manufacturing companies and to make sure that the world knows we are. We are by no means a latecomer to environmental performance. In 1987 Du Pont was awarded the World Environment Center's Gold Medal for Corporate

International

Environmental Achievement. And last year in a *Fortune* magazine survey, the chief executives of top U.S. companies ranked Du Pont second in terms of overall environmental performance and first among chemical companies. Good as that is, it's not good enough. We intend to get further out in front on many of these issues.

Which also explains why I'm delivering my message to you here in Britain. In the environmental arena, the issues are beyond the scope or ability of any one company or any one country to correct. That's no excuse for not embarking on individual or unilateral action. But we have to keep in mind that the economic consequences of environmental action in terms of trade-offs, standards of living, and industrial competitiveness affect the whole world, and thus we need more international mechanisms for addressing environmental issues. The United Nations Environment Programme is doing good work. And the efforts to build an environmental consensus in the European Community will set important precedents.

The primary point for a manufacturer is that industry needs to maintain the same high environmental performance standards regardless of the country of operation. The actions of any one company will continue to reflect on industry as a whole, and it's fair to say that manufacturers around the world are in this together. Industry has a checkered past of successes and failures in environmental matters, and as a result, manufacturers have been painted many colors in recent years. That will have to change. In the future we will have to be seen as all one color. And that color had better be green.

STATEMENT OF A. ALAN HILL

CHAIRMAN, COUNCIL ON ENVIRONMENTAL QUALITY

AND

DIRECTOR, OFFICE OF ENVIRONMENTAL QUALITY

BEFORE THE

SUBCOMMITTEE ON SUPERFUND, OCEAN AND WATER PROTECTION

SENATE COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS

JUNE 1, 1989

Mr. Chairman and Members of the Subcommittee:

Thank you for the opportunity to testify before you regarding the proposed reauthorization of the Office of Environmental Quality (OEQ), certain issues related to the Council on Environmental Quality (CEQ) and the National Environmental Policy Act (NEPA), and S. 1045, a bill to establish a national environmental policy on the United State's involvement in development financing.

As you know, OEQ was established by the Environmental Quality Improvement Act of 1970 (EQIA). That statute directed OEQ to, among other things, provide the professional and administrative staff for the Council on Environmental Quality which had been created a few months earlier by the National Environmental Policy Act.

In addition, the EQIA requires that OEQ assist federal agencies in appraising the effectiveness of existing federal facilities and programs which affect environmental quality, promote the advancement of scientific knowledge of the effects of actions and technology on the environment, and collect and interpret data and information on environmental quality. The EQIA also provides that the Chairman of the Council serves as Director of OEQ.

Although CEQ was given a permanent authorization in NEPA, periodic reauthorization is required for OEQ. Such reauthorization, and certain amendments to NEPA, are the subject of the proposed legislation now before you.

In this testimony, I will briefly describe some of the ongoing activities of the Council on Environmental Quality and the Office of Environmental Quality. I will then offer comments on certain provisions of the draft bill which is submitting for reuathorization of OEQ, and other issues which were identified in the letter of invitation.

Activities of CEQ and OEQ

The Council on Environmental Quality was created in 1970 to assist the President in the preparation of an annual Environmental Quality report, to gather timely information on trends in the environment, and to review the programs and activities of other federal agencies for compliance with the goals and directives of NEPA. OEQ was created shortly thereafter to "provide the professional and administrative staff for the Council." Environmental Quality Improvement Act of 1970, § 202(c)(2); 42 USC § 4371(c)(2).

CEQ/OEQ has divided its responsibilities into three categories for purposes of budget planning: environmental policy analysis and development, interagency coordination of environmental quality programs, and environmental data acquisition and assessment. In addition, in furtherance of these responsibilities, OEQ has been authorized to establish a Management Fund to accept advance payments from other federal agencies to finance studies that are jointly sponsored by OEQ and other federal agencies or interagency environmental projects. I will review our activities in these areas.

Environmental Policy Analysis and Development

The environmental policy analysis and development program is carried out primarily by the Chairman and two Council Members. These activities include providing expert opinion and policy advice to the President on environmental matters, preparing the annual Environmental Quality report, and participation in international environmental activities.

Presidential Advice

I participate in the work of the Domestic Policy Council when environmental matters are discussed. For example, I have been involved in discussions regarding stratospheric ozone depletion, the Montreal Protocol, and export of hazardous wastes. In addition, the two CEQ Members have served on Domestic Policy Council Working Groups. Member Schafer also chaired the Domestic Policy Council's Task Force on Outdoor Recreation Resources and Opportunities.

Annual Environmental Quality Report

Another statutory Council function is the preparation of annual Environmental Quality reports. These reports contain information on conditions and trends in the quality of the nation's environment, and on environmental activities of federal, state, and local government agencies, as well as private entities. The reports also contain CEQ's findings which have been developed through its own studies, work with other federal agencies, and activities authorized by NEPA and other directives.

CEQ's most recent report, the 17th Environmental Quality Report for the year 1986 was released on October 3, 1988. The Council will publish the 18th and 19th reports for the years 1987 and 1988 as one document, which should be available next month.

International Environmental Issues

A third aspect of the Council's environmental policy analysis and development program is our involvement in international environmental issues. The Council acts in concert with White House advisors and the Department of State, the Environmental Protection Agency (EPA), and other agencies to develop international environmental policy. For example, we were actively involved in the preparation of the United States response to the report of the World Commission on Environment and Development, an independent body composed of prominent individuals in the environmental field from around the world.

We are also involved with the United Nations Environment Programme (UNEP) on issues relating to global warming, species preservation, regional seas, and environmental impact assessment. I have just returned from attending the 1989 meeting of the UNEP Governing Council in Nairobi, Kenya.

CEQ has worked with other agencies in discussions of the ratification and implementation of the Montreal Protocol on Substances that Deplete the Ozone Layer, and on the Intergovernmental Panel on Climate Change. The Council also participates in an interagency working group dealing with the export of hazardous wastes.

Further, CEQ is involved with two bi-lateral agreements, one with the Soviet Union and one with Japan. Last year, CEQ hosted a project meeting in the United States and led a delegation to the Soviet Union for a project meeting there under the "Agreement on Cooperation in the Field of Environmental Protection" between the United States and the Soviet Union. This is a particularly significant period in the development of Soviet environmental law inasmuch as the Soviet government is in the process of establishing a new environment agency which will encompass international environmental responsibilities, and is drafting a new environmental law. During 1989, we anticipate hosting two Soviet scholars in the United States for extended study, and we are discussing co-sponsoring a conference at the University of Alaska on Shared Living Resources of the Bering Sea in FY 1990.

CEQ also co-chairs a project on environmental assessment under the "Agreement between the Government of the United States and the Government of Japan on Cooperation in the Field of Environmental Protection." CEQ continues to exchange information with officials of the Environment Agency of Japan under the terms of the agreement. We hope to increase our level of activity under that project to include discussion of environmental impact assessment procedures for foreign assistance projects.

Interagency Coordination of Environmental Quality Programs

The second CEQ/OEQ program activity, interagency coordination of environmental quality programs, involves the promulgation and interpretation of regulations implementing the procedural provisions of NEPA, assistance in coordinating federal environmental programs that involve more than one agency, and resolution of interagency disputes through the NEPA referral process.

CEQ NEPA Regulations

As you well know, Section 102 of NEPA requires that all federal agencies assess the environmental impacts of proposed major federal actions significantly affecting the quality of the human environment. Shortly after NEPA was enacted, the Council issued guidelines to assist federal agencies in complying with this requirement. Through several years of experience, the process evolved into one in which agencies prepared "environmental impact statements" (EIS) for major federal actions significantly affecting the quality of the human environment, and more concise "environmental assessments" (EA) for actions for which the potential environmental impact was unclear.

The lack of a legally binding, uniform body of regulations, however, combined with increasing litigation, led to the production of massive EISs with scant readership and to many criticisms of the NEPA process. To address these concerns, the Council was directed by Executive Order No. 11991 (1977) to develop a set of binding regulations to implement NEPA which would reduce paperwork and delay and improve the decisionmaking process.

Those regulations were promulgated in 1978 and became effective and binding on all federal agencies in 1979. The only amendment to the regulations, one dealing with incomplete and unavailable information, was promulgated in 1986. Courts, including the United States Supreme Court, have been quite supportive of the CEQ regulations.

In addition to promulgating its own regulations, CEQ/OEQ is also called upon to review other agencies' NEPA procedures and to advise them with respect to their responsibilities under NEPA and the CEQ regulations. CEQ/OEQ frequently responds to requests from federal, state, and local agencies, and private citizens to examine federal agencies' NEPA compliance for specific proposed actions.

For example, last year CEQ/OEQ reviewed and approved revisions to NEPA procedures for the Farmers Home Administration, the Department of Housing and Urban Development, and the Department of the Army. In addition to these formal consultations, the CEQ/OEQ staff worked with the Department of the Navy, the Department of the Air Force, the Forest Service, the Federal Aviation Administration, the Federal Communications Commission, and the Nuclear Regulatory Commission to develop revisions to those agencies' NEPA regulations. We are continuing to work with the Federal Aviation Administration in particular regarding NEPA compliance issues involving special use airspace.

Further, the staff has consulted with several federal agencies and environmental organizations regarding the National Science Foundation's (NSF) activities in Antarctica. CEQ/OEQ staff also met with NSF officials to discuss compliance with NEPA and Executive Order No. 12114 (1979) (Environmental Effects Abroad of Major Federal Actions) for their activities in that region, and reviewed NSF's new "Environmental Agenda" and NEPA documentation for construction of a facility at McMurdo Station there.

As a final example, CEQ/OEQ is also working with federal agencies regarding the assessment of cumulative impacts. The CEQ regulations define "cumulative impact" as the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions. See 40 CFR § 1508.7. We have initiated a review of cumulative impact assessment as a component of EISs, and have prepared an inventory of cumulative assessment-related activities conducted by federal agencies.

Coordinating Interagency Environmental Programs

One of our efforts in coordinating federal environmental programs is its participation on the Interagency Task Force on Acid Precipitation (ITFAP) which directs the National Acid Precipitation Assessment Program (NAPAP). NAPAP's Office of the Director of Research is housed in CEQ's offices, and one Member of the Council has been designated as Executive Secretary for

ITFAP. The Task Force carries out NAPAP with funds appropriated to individual federal agencies in accordance with a mutually agreed upon research plan. CEQ/OEQ provides administrative and financial management assistance to NAPAP.

Referral Process

Another facet of CEQ/OEQ's interagency coordination function is the resolution of interagency disputes through the referral process. Section 309 of the Clean Air Act directs the EPA Administrator to

> "review and comment in writing on the environmental impact of...newly authorized Federal projects for construction and any major Federal agency action...to which [NEPA Section 102(2)(C)] applies, and...proposed regulations published by any department or agency of the Federal Government."

That section also requires that if, after such a review,

> "the Administrator determines that any such...action, or regulation is unsatisfactory from the standpoint of public health or welfare or environmental quality, he shall publish his determination and the matter shall be referred to the Council on Environmental Quality."

See also 40 C.F.R. § 1504.1(b).

Similarly, under Section 102(2)(C) of NEPA, other federal agencies may review environmental impact statements and may ask the Council to make findings and recommendations regarding the acceptability of the anticipated environmental effects. See 40 CFR § 1504.1(c).

A referral currently pending before CEQ involves a proposal by the Department of the Interior, Bureau of Reclamation, to renew long-term water contracts for the Orange Cove and other Friant Unit irrigation districts of the Central Valley Project in California. The Department of the Interior has taken the position that NEPA does not require an EIS for the renewal of the contracts. EPA referred this matter, stating that "making irretrievable long-term commitments of water use without benefit of an EIS violates the purposes and intent of NEPA." Letter from John A. Moore, Acting Administrator, EPA, to the Honorable A. Alan Hill, Chairman, CEQ, February 2, 1989.

CEQ published a Federal Register notice on February 9, 1989, seeking public comment on whether the issue raises issues of national importance, whether CEQ should proceed with consideration of the issues raised in the referral, and suggestions as to procedures to be followed should the referral be accepted. On March 26, 1989, CEQ published a Federal Register notice stating that CEQ was accepting the referral. Since that time, we have held two public meetings to take comment on the referral - one in Washington, D.C. on April 13, 1989, and one in Fresno, California, on April 17, 1989. We also had a written comment period.

Currently, we are reviewing the testimony and the over 1,500 pages of written comments which we have received. We expect to issue Findings and Recommendations on the referral this month.

In the most recently completed referral, the Department of the Interior asked the Council to review a proposal by the Department of the Navy (United States Marine Corps) to establish the Cherry I and Core Military Operating Areas (MOA) at Cherry Point, North Carolina. The primary issue raised in the referral was the potential noise impact on the Cape Lookout National Seashore which is managed by the National Park Service. The Council held a public meeting in January, 1988, and provided an opportunity for written comments to be submitted for the Council's consideration. Council Chairman Hill conducted a site visit and held additional meetings in the area in May, 1988.

By letter dated September 13, 1988, the Council made several findings and recommendations. First, the Council was unable to conclude that there were any reasonable alternative sites available to the Marine Corps for its low altitude, high speed training flights. Thus, the Council stated that the National Park Service and the Marine Corps should work together to mitigate the expected noise impacts on the seashore. As part of this resolution, the Marine Corps should undertake environmental monitoring studies which examine the actual impacts of the overflights on the park.

Second, the Council found that the cumulative effects of military airspace use over North Carolina had not been adequately considered, and that the Federal Aviation Administration (FAA), the agency which will give final authority for the overflights, must prepare a cumulative impact analysis as part of its NEPA documentation for the Cherry I and Core MOA designation request.

Finally, the Council found a need for coordination within the Department of Defense to adequately assess the cumulative impacts of the military agencies' airspace use requests, and a need for consideration of the inherent conflicts between airspace use and land use below. The Council also found that the FAA needs to play a larger role in the assessment of competing uses and of cumulative impacts of all its airspace designation decisions.

Environmental Data Acquisition and Assessment

In its environmental data acquisition and assessment program, CEQ/OEQ's objective is to improve federal data and monitoring capabilities and to track the numerous environmental research and monitoring programs of federal agencies. The most recent activity is this regard is an interagency effort, coordinated by CEQ/OEQ, to update information about environmental data sources and to produce an Environmental Trends--II report.

CEQ/OEQ had the central coordinating role in developing the first Environmental Trends report and co-sponsoring its initial publication in 1981. The revision of the report at 5-year intervals was deemed a meaningful time period for discernable trends to develop. Through the use of maps and charts, the report is designed to portray quantitatively the current conditions and trends in the quality of the environment.

An interagency working group for the second report was established in 1985, with membership from approximately 15 agencies. Multi-agency funding was begun and a support contract awarded. The interagency working group continued to meet frequently for planning and evaluation of draft products.

Although work has progressed at a slow pace, the report is now essentially complete and it is undergoing interagency review. Publication is expected in the near future.

OEQ Management Fund

CEQ/OEQ acts as the environmental coordinator, mediator, and consultant for the Executive Branch of the federal government. In this capacity, the Council/Office conducts various activities in cooperation with other agencies to develop and implement environmental policies for the Administration. To facilitate this function, the Office of Environmental Quality has been granted statutory authority for a management fund account to finance "(1) study contracts that are jointly sponsored by the Office and one or more other federal agencies; and (2) Federal interagency environmental projects (including task forces) in which the Office participates." (Pub. L. No. 98-581).

The fund was established pursuant to the most recent Reauthorization Act for OEQ and began actual operation in FY 1985. This new account replaced a Consolidated Working Fund, which had previously been granted on an administrative basis to the agency by the Office of Management and Budget. The Management Fund is more suitable administratively for conducting studies, projects, and task forces with other agencies about emerging environmental policies. In addition, the existence of a statutorily-established Management Fund improves the ability of

Congress to oversee operation of the fund.

To establish and maintain financial integrity and accountability, the fund is required to publish internal policies and procedures to govern its operation. Further, the annual budget estimates for the Management Fund are presented as a separate schedule in the Appendix for the Budget of the United States.

For accounting and budget presentation purposes, the Management Fund is divided into two program divisions: Division 100 -- Environmental Policy Development Studies and Projects, and Division 200 -- Interagency Task Force on Acid Precipitation (ITFAP) which operates the National Acid Precipitation Assessment Program (NAPAP).

Division 100 (Environmental Policy Development Studies and Projects)

All proposed projects are first reviewed for scientific merit and technical validity by a Council Member. The Director of OEQ then considers any recommendation for approval, taking into account the project's potential to contribute to agency program goals. Those proposals with interdisciplinary, international, or intergovernmental elements are more attractive, as are projects in which CEQ/OEQ involvement provides enhanced public participation, objectivity, independence, or technical expertise.

The oversight and quality control which OEQ provides for these studies and projects insures that the work is conducted quickly, efficiently, and competently. Potential conflicts of interest between the sponsoring agency and the contractor can also be avoided. It should be stressed that CEQ/OEQ has a fundamental interest in each Division 100 interagency study or project it undertakes.

Division 200 (Interagency Task Force on Acid Precipitation)

The NAPAP Office of the Director operates through the OEQ Management Fund. The NAPAP Joint Chairs Council, representing NAPAP's major funding agencies, approves a total NAPAP budget, which is apportioned to individual participating agencies. Based on each agencies' proportional share of the total research budget, funds to support the Office of the Director are transferred to the OEQ Management Fund for financial management of NAPAP's coordinating activities. All obligations of federal funds from Division 200 are reviewed and approved by CEQ's Administrative Specialist or, for larger amounts, by the CEQ Member who serves as the Executive Secretary to the ITFAP.

The program expenses for NAPAP's Office of the Director are different from those for contract studies. NAPAP operates as an independent accounting entity from its member agencies. Several federal agencies contribute funds (through interagency agreements) and detail personnel to support ITFAP activities. The Office of the Director pays for its administrative costs and its contract expenses from the Management Fund account. Thus, its operating budget includes all object class categories, except for personnel and official representation.

Proposed Legislation: Authorizing Appropriations for OEQ and Amending NEPA

Chairman Lautenberg has indicated that he intends to introduce legislation which would not only authorize appropriations for OEQ, but also amend NEPA in several significant ways. NEPA has worked well for the last two decades, and has nor been amended during that time. Amendments to the statute should be made only after very careful consideration, keeping in mind the stability of the NEPA process which has provided many benefits to the taxpayers of our country. **Amendments should not be made when regulatory modifications or guidance from the Council would suffice. With that thought, I** will briefly **comment on the NEPA amendments** proposed in the draft bill.

Section 1(b)(1)

Section 1(b)(1) of the draft bill seeks to apply the NEPA process to actions taken by the federal government outside of the boundaries of the United States. This is an issue which has been hotly debated in the past. My testimony before the Subcommittee on Hazardous Wastes and Toxic Substances of this Committee last year recounts much of the history of that debate.[1] Administration's position is that this issue was resolved by issuance of Executive Order 12214, providing for analysis of environmental impacts of major federal actions abroad, and that any problems or gaps which are identified in the coverage of environmental impact assessment for federal actions abroad should be addressed by amendment of that Executive Order.

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[1]. Testimony of A. Alan Hill, Chairman, Council on Environmental Quality, Hearing Before the Subcommittee on Hazardous Wastes and Toxic Substances, Committee on Environment and Public Works, United States Senate, June 16, 1988.

Section 2

Section 2 of the draft bill seeks to amend Section 201 of NEPA by requiring that the CEQ annual report become more of a policy document, rather than a document which must comprehensively review the status of all environmental media.

Although some modification of the annual report may be appropriate, I believe that the current report can and does achieve many objectives of this section.

While the present Council has worked very hard to prepare extensive Environmental Quality reports in compliance with Section 201, that process is quite time-consuming. We have relied heavily on other federal agencies for necessary information, but, understandably, these other agencies cannot place a high priority on assisting in the preparation of CEQ's report. For this reason, we have been regrettably slow in producing the Environmental Quality report, although I am pleased to say that due to extraordinary efforts we are about to bring ourselves up-to-date by publishing the 1987 and 1988 reports together as one document in the near future.

Section 4

Section 4 of the proposed bill seeks to require each federal agency to review "a statistically significant sample of ...[EISs] in which measures were specified for the mitigation of any adverse impact on the environment that was predicted to occur as a result of the agency action." This provision is similar to provisions in H.R. 2020 and S. 1792, passed by the House and Senate respectively in the last session of Congress and H.R. 1113 this year, although it does provide for more flexibility.

While I believe that a review of mitigation implementation may be appropriate, the process described in these bills could prove to be quite burdensome on CEQ and the other federal agencies. I suggest that federal agencies be required to undertake a one-time review of the mitigation measures imposed in a representative sample of EISs, the accuracy of the predictions made in those EISs, and the effectiveness of the mitigation measures. The agencies would submit their analyses to CEQ which would report to Congress and make recommendations regarding the need for additional, periodic mitigation implementation reviews.

Structure of the Council on Environmental Quality

Recently, there have been some discussion about changing the structure of CEQ, generally in respect to the role of the Members of the Council. As you know, NEPA currently provides for a three Member Council, with one of those Members designated Chairman by the President. All Members serve full time. The Chairman also acts as Director of the Office of Environmental Quality.

For certain purposes, the Council acts as a collegial body, and because of this, the Government in the Sunshine Act has been found to be applicable to the Council[2], even when formulating advice to the President. This has severely restricted the free flow of communication between the Chairman and the two Council Members. While we have diligently complied with the law, and have held numerous Sunshine meetings during my tenure as Chairman, I believe that in the area of Presidential advice, the Sunshine Act's applicability to CEQ is both a practical and a Constitutional problem.[3]

The Blueprint for the Environment document, prepared by our Nation's environmental community, recommended that the Council be restructured to become an Office of Environmental Quality, headed by a single Director reporting to the President. Another idea has been to appoint a full time Chairman with four part-time advisory Council Members. The administration is currently considering these options, but there has been no final decision.

Recent NEPA Decisions by the U.S. Supreme Court

On May 1, 1989, the United States Supreme issued opinions in two NEPA cases, which are Robertson v. Methow Valley Citizens Council[4] and Marsh v. Oregon Natural Resources Council[5].

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[2]. Pacific Legal Foundation v. Council on Environmental Quality, 636 F.2d 1259 (1980).

[3]. See Id. at 1265; Washington Legal Foundation v. Department of Justice, 691 F. Supp. 483, 493-96 (D.C.C. 1988), certiorari granted, 109 S. Ct. 526 (1988).

[4]. 57 U.S.L.W. 4497 (U.S. May 1, 1989).

[5]. 57 U.S.L.W. 4504 (U.S. May 1, 1989).

Together, those cases raised the issues involving the "worst case analysis" regulation, the role of mitigation in an environmental impact statement (EIS), the standard for supplementing an environmental impact statement, and the standard of judicial review when ruling on an agency's decision not to prepare a supplemental EIS. Both decisions were unanimous, and upheld the government on all points.

In Robertson v. Methow Valley Citizens Council, the Supreme Court upheld CEQ's 1986 amendment of the regulation dealing with incomplete or unavailable information in the context of an EIS.[6] As this Committee may recall, CEQ went through a long (1983-1986) and difficult amendment process after much controversy ensued about the "worst case analysis" requirement. The amended regulation substitutes for the worst case analysis requirement a requirement that agencies "evaluate the impacts based upon theoretical approaches or research methods generally accepted in the scientific community." For the purposes of that regulation, the term "reasonably foreseeable" includes impacts which have catastrophic consequences, even if their probability of occurrence is low, provided that the analysis of the impacts is supported by credible scientific evidence, is not based on pure conjecture, and is within the rule of reason."[7]

The Court of Appeals for the Ninth Circuit held in the

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[6]. Robertson V. Methow Valley Citizens Council, 57 U.S. L.W. at 4503.

[7]. 40 C.F.R. 1502.22 (1988).

Methow Valley case that the worst case analysis regulation was required by NEPA and the case law interpreting NEPA. The U.S. Supreme Court affirmed CEQ's view that while agencies must make constructive efforts to provide meaningful analysis of significant adverse impacts even in the face of incomplete or unavailable information, neither NEPA nor the case law developed under it require that the tool to accomplish that goal be labeled "worst case analysis".

The Methow Valley decision also reiterates the Supreme Court's long-standing view of NEPA as a procedural, rather than a substantive statute, as least in relation to the requirements of Section 102(2)(C) requiring a "detailed statement" for "legislation and other proposals for major federal actions significantly affecting the quality of the human environment". Thus, while the Court emphasized that, "To be sure, one important ingredient of an EIS is the discussion of steps that can be taken to mitigate adverse environmental consequences,"* it found a fundamental distinction between a substantive requirement that a mitigation plan be formulated and adopted and a procedural requirement that mitigation be discussed in sufficient detail to ensure that environmental consequences have been fairly evaluated.

In Marsh v. Oregon Natural Resources Council, the Supreme Court upheld the current standard for determining when an agency must prepare a supplemental EIS[9]. That standard, embodied in 40 C.F.R. 1502.9(c) states that agencies shall prepare supplements to either draft or final environmental impact statements if: (1) the agency makes substantial changes in the proposed action that are relevant to environmental concerns; or (2) there are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action and its impacts. An agency may also prepare a supplemental EIS if it believes it will further the purposes of NEPA. The Court also decided that the proper standard of judicial review for the question of whether the agency's determination that the EIS in that case need not be supplemented was the "arbitrary and capricious" standard, derived from the Administrative Procedures Act, as opposed to the "reasonableness" standard which has been utilized by several circuits.

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*. Robertson v. Methow Valley Citizens Council, 57 U.S. L.W. at 4502.

Generally speaking, I do not think the Supreme Court decisions will result in any major changes in the implementation of NEPA, as it has developed over the past nineteen years. The opinions affirm, in relevant part, the CEQ regulations and do not require any changes in them or in agency practices. Both opinions also affirm that the CEQ regulations are entitled to "substantial deference".[10]

Comments on S. 1045

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[9]. 57 U.S. L.W. at 4509.

[10]. Robertson v. Methow Valley Citizens Council, 57 U.S. L.W. at 4503; Marsh v. Oregon Natural Resources Council, 57 U.S. L.W. at 4507.

Senate bill 1045 appears to be a modification of a bill introduced in the last session of Congress, S. 2753. Both bills have the goal of establishing a system of environmental impact assessment which would be used to analyze projects proposed for funding by the multilateral development banks (MDBs). This is a goal which both CEQ supports. Last year's bill, S. 2753, would have required that an EIS be included in every recommendation for a vote of the United States Executive Director of each MDB on a proposed action significantly affecting the quality of the human environment. The bill required preparation of the EIS no less than 120 days before the date of the vote on the proposed action. Further, it would have allowed CEQ to modify the procedural requirements of NEPA under certain circumstances and stated that the content of the "detailed statement" should be obtained from the international financial institution. Last year, many agencies opposed this approach, believing that it would impose unworkable requirements on the Department of the Treasury and provoke resentment from borrower countries.

This year's bill, S. 1045, appears to address many of the concerns expressed last year. We are supportive of the changes which have been made in the bill over the past year, and think that it is much improved as a result of these changes. The bill authorizes the use of internationally recognized standards for environmental impact assessment to be used as the basis for the detailed statement to be reviewed prior to a vote. This is a very important step. However, the criteria would still be promulgated by the United States. I believe that a better approach would be to authorize the Secretary of the Treasury to initiate international discussions with the goal of developing criteria and procedures for conducting environmental impact assessment in the MDBs. The goal of these discussions would be to agree upon internationally accepted criteria and procedures which could be adopted by the banks to guide their internal procedures. I believe that the Goals and Principles of Environmental Impact Assessment passed unanimously by the 58 nations of the United Nations Environment Programme Governing Council in 1987 would be a valuable tool in this effort. The United States, along with other donor nations in the MDBs, should encourage the MDBs to make the results of the environmental impact assessment process on specific projects available to the public well in advance of the bank's decision. This approach would present the banks with a "united front", and clearly indicate the preference of donor nations.

Senate Bill 1045 adopts the suggestion made last year that to assist the international financial institutions in developing their environmental program by authorizing relevant federal agencies to provide U.S. personnel for training, preparation of documents, and similar activities. We would suggest that the word "shall" in this provision be changed to "may", so that the head of a federal agency may retain some discretion about particular requests in light of other agency mission activities, but we strongly support such assistance to the extent possible.

DRAFT P1

MEMORANDUM

FOR: Heads of Federal Agencies

FROM: A. Alan Hill, Chairman

SUBJECT: Guidance Regarding Consideration of Global Climatic Change in Environmental Documents Prepared Pursuant to the National Environmental Policy Act

DATE:

Introduction

Beginning in 1987, the Council on Environmental Quality (CEQ) held a series of public meetings related to stratospheric ozone depletion and global warming.[1] CEQ heard not only from noted scientists on the probable causation of these phenomena, but also from experts on the possible human health, biological, terrestrial, and aquatic effects. In addition, the Council was briefed on the status of research being conducted by federal agencies into these questions. The Council concluded its series of meetings by inviting representatives of several federal agencies and members of the public to discuss global climatic change[2] in the context of the environmental impact assessment process under the National Environmental Policy Act (NEPA).

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[1] A list of the meetings held is attached as an appendix.

[2] In this guidance document, the phrase "global climatic change" is used as shorthand for the separate, but somewhat interrelated, phenomena of stratospheric ozone depletion and global warming.

While there are many unanswered questions with respect to stratospheric ozone depletion and global warming, the Council recognizes that the available scientific evidence regarding these phenomena furnishes sufficient cause for serious concern. Rather than wait until all scientific uncertainties are resolved, the Council has concluded that federal agencies should begin now to examine how their actions may contribute to, and could be affected by, global climatic change. This memorandum provides guidance on how such an examination of federal actions should be done in the context of environmental documents prepared pursuant to NEPA.

The phenomena of stratospheric ozone depletion and global warming, and their potential effects, are briefly described below. The Council then outlines how NEPA and the CEQ regulations compel consideration of these phenomena in NEPA documents, and how the NEPA process can be used to assess the impact of federal actions on global climatic change and the effects of such change on federal actions.

Stratospheric Ozone Depletion[3]

In 1974, scientists first hypothesized that manufactured chlorofluorocarbons (CFCs) could deplete the stratospheric ozone layer. Under this hypothesis, CFCs, emitted at the earth's surface in increasing quantities, slowly diffuse to and degrade in the stratosphere,[4] breaking into chlorine atoms which ultimately chemically destroy ozone molecules. This chemical process results in a thinning of the stratospheric ozone layer.[5]

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[3] Specific references for this section are: Albritton, Daniel L., National Oceanic and Atmospheric Administration, Stratospheric Ozone: The State of the Science and NOAA's Current and Future Research, July 1987, at iv-vi, 1-7; Molina, M., and F. S. Rowland, "Stratospheric Sink for Chlorofluoromethanes: Chlorine Atom-Catalysed Destruction of Ozone," Nature, Vol. 249, pp. 810-12 (1974); United States Environmental Protection Agency, Assessing the Risks of Trace Gases That Can Modify the Stratosphere, December 1987, Volume I (Executive Summary) at 2-4; and United States Environmental Protection Agency, Environmental Impact Statement on Montreal Protocol on Substances That Deplete the Ozone Layer, January 1988, at 1-1 to 1-2, 2-1, 3-2. See generally National Aeronautics and Space Administration, Present State of Knowledge of the Upper Atmosphere 1988: An Assessment Report, August 1988; United Nations Environment Programme and United States Environmental Protection Agency, Effects of Changes in Stratospheric Ozone and Global Climate Change, 1986, Volumes I (Overview) and II (Stratospheric Ozone); United States Environmental Protection Agency, Regulatory Impact Analysis: Protection of Stratospheric Ozone, 1987; and United States Environmental Protection Agency, Future Concentrations of Stratospheric Chlorine and Bromine, August 1988.

[4] The stratosphere is that region of the atmosphere 10 to 50 km (6 to 30 miles) above the surface of the earth. Most ozone is in the stratosphere, although smaller amounts are found in the lower atmosphere where it is composed of a residue from the stratosphere and is produced by air pollution.

A thinner ozone layer would absorb less solar ultraviolet (UV) light and would allow increased UV radiation to reach the earth's surface. Excess amounts of UV radiation are associated with increased incidences of skin cancer, cataracts, and other biological effects such as reduced crop yields and disruption of some terrestrial and aquatic ecosystems. Increased UV radiation could also increase polymer (e.g., polyvinyl chloride) degradation and could increase ground level oxidants (smog).

Research conducted into the response of the stratosphere to ozone-altering compounds and long-term monitoring done to obtain direct evidence of the predicted effect on stratospheric ozone have substantially increased confidence in the ozone depletion hypothesis.[6] For example, there is emerging scientific consensus that the ozone "hole" over Antarctica is due to the reaction of CFCs in the unusually cold Antarctic stratosphere. Most atmospheric scientists do believe that if the present growth rates of CFCs and other ozone-depleting gases continue unabated indefinitely, then it is highly likely that substantial global ozone depletion will occur in the next century, particularly at the higher altitudes and latitudes.[7]

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[5] CFCs are not the only manufactured chemical compounds which can affect stratospheric ozone. Halons, which contain bromine, also have the potential to destroy ozone molecules. In fact, bromine atoms are considerably more effective in destroying ozone molecules than are chlorine atoms. Both CFCs and halons are halogenated compounds (i.e., a class of hydrocarbons in which one or more of the hydrogen atoms have been replaced by a halogen--a chlorine, bromine, or fluorine atom). The degree of hydrogen atom replacement and the particular halogens involved determine the relative effectiveness of a chemical compound to deplete stratospheric ozone.

CFCs are used in a wide variety of consumer and industrial goods, including air conditioning, refrigeration, foam products, and solvents. These gases are quite stable and can exist in the lower atmosphere for a century or more. Their unusual chemical stability allows them to reach the stratosphere intact; there solar ultraviolet radiation causes them to break apart, releasing chlorine. The production of halons, used for fire suppression, is currently relatively small, but, as noted above, they contain bromine which is even more effective than chlorine in ozone reduction.

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[6] To date, very little monitoring has been done to determine whether increased amounts of UV radiation are in fact reaching the earth's surface.

[7] Recognizing that CFCs may damage stratospheric ozone, the United States signed the Montreal Protocol on Substances That Deplete the Ozone Layer in September, 1987. This protocol calls for signatory nations to freeze CFC production and consumption at 1986 levels in 1989, to reduce those levels by 20% in 1993, and to further reduce those levels by an additional 30% in 1998.

President Reagan, in transmitting the Montreal Protocol to the United States Senate for ratification, called it an "historic agreement" which was undertaken "to protect a vital global resource." The President also stated that ratification by the United States would be necessary for effective implementation of the Protocol and would "encourage similar action by other nations whose participation is also essential." Message to the Senate Transmitting the Protocol, 23 Weekly Comp. Pres. Doc. 1545 (December 21, 1987).

Global Warming*

While the phenomenon of stratospheric ozone depletion is a relatively recent discovery, global warming was predicted in 1896 by a Swedish chemist who postulated that the increasing atmospheric concentration of carbon dioxide and other gases from industrialization would trap more solar heat, thus raising the earth's temperature.* Scientific research conducted to date has demonstrated that atmospheric levels of carbon dioxide have increased 25% since pre-industrial times and continue to rise. The National Academy of Sciences has estimated that a doubling of carbon dioxide concentration, which could occur by the middle of the next century, would lead to global warming of 1.5 to 4.5 degrees celsius (3 to 8 degrees Fahrenheit).

Greenhouse gases include carbon dioxide, methane, and nitrous oxide. These gases occur naturally, but are also produced industrially. For example, the burning of fossil fuels introduces a large amount of carbon dioxide into the atmosphere.[10] Ozone, a pollutant which is chemically produced in the lower atmosphere, and CFCs are still other greenhouse gases.[11]

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* Specific references for this section are: National Academy of Sciences, Carbon Dioxide and Climate: A Scientific Assessment, 1979, at 1-3; National Academy of Sciences, Carbon Dioxide and Climate: A Second Assessment, 1982, at 1-14; and National Academy of Sciences, Changing Climate: Report of the Carbon Dioxide Assessment Committee, 1983, at 1-4. See generally Council on Environmental Quality, Global Energy Futures and the Carbon Dioxide Problem, January 1981; United Nations Environment Programme and United States Environmental Protection Agency, Effects of Changes in Stratospheric Ozone and Global Climate Change, 1986, Volumes I (Overview), III (Climate Change), and IV (Sea Level Rise); and United States Environmental Protection Agency, Greenhouse Effect, Sea Level Rise and Coastal Wetlands, July 1988.

* "Global warming" should be distinguished from the "greenhouse effect." Carbon dioxide and other trace gases absorb heat radiation from the earth's surface, trap it, and prevent it from dissipating back into space. Without this "greenhouse effect," the earth's temperature would be substantially lower. As the concentration of greenhouse gases increases, however, scientists hypothesize that more of the earth's radiated heat will be trapped, leading to overall global warming.

A warming of the earth's temperature could cause changes in global climatology, such as possible shifts of desert and fertile regions, intensification of tropical storms, and a rise in sea level caused by expansion of sea water as it warms and by glacial melting. Although there are still considerable doubts with respect to the timing and extent of global warming, most scientists consider it highly likely that a global warming trend will eventually be caused by an increased concentration of greenhouse gases.[12]

The Role of the NEPA Process

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[10] Plants and trees consume carbon dioxide, but increasing deforestation lessens the amount of carbon dioxide consumed. Further, when downed trees are burned or allowed to rot, carbon dioxide and other greenhouse gases are released.

[11] Ironically, the presence of carbon dioxide in the stratosphere acts to lessen the rate of stratospheric ozone depletion. See, e.g., United States Environmental Protection Agency, Assessing the Risks of Trace Gases That Can Modify the Stratosphere, December 1987, Volume I (Executive Summary) at 5. Thus, increased levels of carbon dioxide may add to the problem of global warming in the lower atmosphere, but reduce the problem of ozone depletion in the stratosphere.

[12] Some scientists believe that an increase in surface temperature will increase cloud cover, lessening any warming, or even cooling, the earth's temperature by reflecting sunlight back into space. In addition, there is a continuing debate over the moderating influence of the oceans on global warming.

In enacting NEPA in 1969, Congress directed federal agencies to consider the effects[13] of their actions on the human environment. Among the many responsibilities set forth in the Act, NEPA requires federal agencies to "[i]nclude in every recommendation or report on proposals for legislation and other major federal actions significantly affecting the quality of the human environment, a detailed statement" which addresses the environmental impact of the proposed action. NEPA, Section 102(2)(C). The CEQ regulations implementing this provision of NEPA mandate that federal agencies address all reasonably foreseeable environmental impacts of their proposed programs, projects, and regulations. See 40 CFR §§ 1502.4, 1508.8, 1508.18, and 1508.25.

Whether stratospheric ozone depletion and global warming should be considered "reasonably foreseeable" impacts of emissions of CFCs, halons, and greenhouse gases are thus threshold issues: if these impacts are reasonably foreseeable, then federal agencies must address them in NEPA documents; if not, then they do not come within the scope of a NEPA analysis.

The available scientific evidence and the presentations made in CEQ's public meetings indicate that stratospheric ozone depletion and global warming are "reasonably foreseeable" impacts of emissions of CFCs, halons, and greenhouse gases, as that phrase is understood in the context of NEPA and the CEQ regulations.[14] As a result, stratospheric ozone depletion and global warming are effects which must be considered in NEPA documents in the future.

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[13] In this memorandum, as in the CEQ regulations, "effect" is synonymous with "impact." See 40 CFR § 1508.8.

Specifically, federal agencies must determine whether and to what extent their actions affect emissions of stratospheric ozone depleting substances or greenhouse gases. Further, federal agencies must consider whether the actions they take, e.g., the planning and design of federal projects, may be affected by any changes in the environment which might be caused by global climatic change.

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[14] It should be noted that, in the scientific community, the stratospheric ozone depletion hypothesis enjoys a stronger degree of certainty than does the global warming hypothesis. With respect to ozone depletion, scientists have a good understanding of the chemical reactions which occur when CFCs degrade in the stratosphere, and empirical evidence that stratospheric ozone is thinning. On the other hand, scientists do not yet understand how the earth's response mechanisms might operate to modify or delay global warming. For example, although current climate models suggest that increased concentrations of greenhouse gases will lead to global warming, the trend of global surface temperature for the past 100 years, while not incompatible with predictions of global warming, shows evidence of other factors influencing annual variations of temperatures. For purposes of NEPA, however, both stratospheric ozone depletion and global warming should be viewed as reasonably foreseeable impacts of emissions of CFCs and greenhouse gases, respectively.

It should be kept in mind that global climatic change is just one of many issues to be analyzed in NEPA documents.[15] By providing this guidance, the Council is not suggesting that the global climatic change issue should be emphasized over other environmental effects, or that any emission, no matter how small, of a stratospheric ozone depleting substance or greenhouse gas will trigger the requirement to prepare an environmental impact statement (EIS).

Further, this guidance is not intended to discredit the adequacy of NEPA documents which have already been prepared without a discussion of global climatic change. Nor should this be read as requiring such a discussion in NEPA documents which are currently in the final stages of preparation. Rather, the Council recognizes that global climatic change is an emerging issue of great significance on which scientific consensus has been developed only recently, and that meaningful analysis of the issue has not been possible until this time.

In sum, very few federal agencies have focused on global climatic change in their NEPA documents.[16] Stratospheric ozone depletion and global warming are serious concerns, however, and federal agencies should be aware of how their proposals may contribute to or be affected by climatic changes. Each agency must exercise its own independent judgment and discretion to determine the extent to which it should assess global climatic change in its NEPA documents.

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[15] The Natural Resources Defense Council (NRDC) and others have strongly urged CEQ to amend its NEPA regulations to "require all federal agencies fully to analyze the causes of and impacts from climate disruption for all major federal actions significantly affecting the quality of the human environment." Letter to Chairman A. Alan Hill, Chairman, from David A. Wirth, Senior Attorney, NRDC, dated November 9, 1988 (NRDC Letter), at 1. As NRDC acknowledged, however, the scope of NEPA and the CEQ regulations is broad enough to include global climate change and its predicted effects. See NRDC Letter at 7-8. For example, section 1508.8 defines "effects" to include ecological, aesthetic, historic, cultural, economic, social, or health effects. Thus, a regulatory change is not necessary in order to require federal agencies to consider global climate change in their NEPA documents.

Applying the NEPA Process

As noted above, there are two aspects of global climatic change which should be considered in NEPA documents: (1) the potential for federal actions to influence global climatic change (e.g., increased emissions of CFCs, halons, or greenhouse gases) and (2) the potential for global climatic change to affect federal actions (e.g., feasibility of coastal projects in light of projected sea level rise). As a first step, each federal agency should immediately review whether and to what extent its activities (both continuing and proposed) contribute, directly or indirectly, to the emission of CFCs or greenhouse gases and thus to global climatic change. Consideration should also be given as to whether and to what extent its activities will be affected by the consequences of stratospheric ozone depletion and global warming.

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[16] One exception is the National Aeronautics and Space Administration which discussed possible impacts on stratospheric ozone in its environmental impact statement for the space shuttle program. See National Aeronautics and Space Administration, Final Environmental Impact Statement for the Space Shuttle Program, April 1978, at 80-91.

Federal Actions Influencing Global Climatic Change

Clearly, both projects and programs proposed by federal agencies, including permits issued by federal agencies, can cause increased emissions of CFCs and greenhouse gases. Analysis of the impacts of such emissions at the project level, however, would not provide meaningful information in most instances. Efforts would be better spent in assessing federal programs which may affect emissions of these gases. This type of approach recognizes that individual projects may increase CFC and greenhouse gas emissions by only marginal amounts, but that the cumulative effect of such emissions could be more dramatic.

It is long-range federal programs which have the greatest likelihood for influencing global climatic change. Thus, it is in programmatic NEPA documents where an analysis of global climatic change would be most useful. Proposals regarding long-range energy, transportation, and forest management programs in particular are prime candidates for programmatic environmental assessments (EA) or EISs which include an analysis of how the programs will contribute to (or reduce) emissions of greenhouse gases. Discussions of these issues in programmatic documents could then be incorporated by reference in (or "tiered" to) more site specific NEPA documents. See 40 CFR § 1508.28.

With respect to ongoing federal programs, federal agencies should review the extent to which such programs may contribute to stratospheric ozone depletion or global warming. Existing programmatic EAs or EISs may need to be supplemented or new programmatic documents prepared to substantiate the results of this review.

Federal agencies are reminded that their actions may directly, and indirectly, influence emissions of CFCs and greenhouse gases, and that the CEQ regulations require analysis of both direct and indirect, as well as cumulative, effects in NEPA documents. See 40 CFR §§ 1508.8 and 1508.25.

Effects of Global Climatic Change on Federal Projects

While analyzing how federal actions might contribute to global climatic change will not be easy, examining the effects of stratospheric ozone depletion and global warming on proposed federal actions is an even more complex task. As discussed above, the hypotheses themselves are well supported, but the predicted effects are subject to substantial scientific uncertainty. For example, there currently is no consensus on the regional climatic changes that might occur with increased greenhouse gas concentrations. Thus, predicting what climate conditions might prevail at a particular place or time is troublesome at best.

Dealing with this type of uncertainty is discussed in 40 CFR § 1502.22. Under that regulation, if information relevant to reasonably foreseeable significant adverse impacts cannot be obtained because the costs of obtaining it are exorbitant or the means to obtain it are not known, the federal agency must include in its EIS a statement that such information is incomplete or unavailable, a statement of the relevance of the incomplete or unavailable information to evaluating the reasonably foreseeable adverse impacts, a summary of existing credible scientific evidence which is relevant to evaluating the reasonably foreseeable adverse impacts, and the agency's evaluation of such impacts based upon theoretical approaches or research methods generally accepted in the scientific community. The regulation also states that "reasonably foreseeable impacts" includes those which have catastrophic consequences, even if their probability is low, provided that the analysis of the impacts is supported by credible scientific evidence, is not based on "pure conjecture," and is within the rule of reason.

Federal agencies must pay close attention to the research which is being conducted regarding climate change impacts. While such research will allow for better predictions in the future, regional predictions are not presently available. In the meantime, the absence of this information will often require federal agencies to comply with the dictates of Section 1502.22. Agencies will need to continually review the available scientific evidence on the effects of global climatic change and determine which effects have a reasonable scientific basis and which are "pure conjecture."

The validity of using the NEPA process to assess the impacts of global climatic change on federal projects is dependent upon the duration of the action. For short-term actions, climatic conditions should not be sufficiently different from the current climatic situation as to require major modifications. Long-term actions, however, may need to be modified because of the anticipated effects of global climatic change. Agencies need to identify those projects and programs which are most sensitive to climate change effects such as higher temperatures, more severe storms, drier or wetter conditions, and sea level rise. Long-range decisions concerning agriculture, forestry, and coastal zone resources, as well as decisions regarding sites for proposed facilities, need to be supported by EAs or EISs which analyze, to the extent possible, the reasonably foreseeable impacts of global climatic change.[17]

For example, scientists have projected a 1.5 to 4.5 degree celsius (3 to 8 degree Fahrenheit) temperature rise if carbon dioxide and other gaseous emissions continue to rise at the current rate unabated. This translates into a predicted sea level rise of up to 8 inches by 2025 and up to 6 feet by 2100--a consequence with a severe impact on coastal resources. Thus, an agency proposing a long-term project in a coastal region should consider this potential impact in the NEPA document prepared for the project.

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[17] For example, the Forest Service is currently looking at the effects of global climate change on forest ecosystems. The results of this research will help the agency decide how it should alter the management of its forests to sustain forest health and productivity in light of climate changes. In addition, the Nuclear Regulatory Commission has recognized that higher temperatures could increase the demand for energy and that drought conditions could affect the availability of heat sinks for the nuclear power plants regulated by the agency.

Conclusion

Global climatic change is a serious environmental concern which, given the current state of scientific knowledge, must be viewed under NEPA as a reasonably foreseeable impact of continued emissions of CFCs and greenhouse gases. Thus, federal agencies must analyze the extent to which both their proposed and ongoing programs or other activities might influence such emissions, thereby contributing to (or reducing) the problems of stratospheric ozone depletion and global warming. Such analyses can best be done in the context of NEPA and should look at how federal actions may affect global climatic change and, to the extent possible given the current state of scientific knowledge, how federal actions may be affected by global climatic change.

APPENDIX

PUBLIC MEETINGS HELD BY THE COUNCIL ON ENVIRONMENTAL QUALITY REGARDING STRATOSPHERIC OZONE DEPLETION AND GLOBAL WARMING

April 7, 1987	**Dr. Jarvis Moyers**, Chief Atmospheric Scientist, National Science Foundation, on Climate Change Due to the Greenhouse Effect and Stratospheric Ozone Depletion
July 22, 1987	**Dr. S. Fred Singer**, Chief Scientist and Science Technology Advisor to the Secretary of the Department of Transportation; and **Dr. Irving Mintzer**, Director of the Program in Energy Climate and Industrial Resources, World Resources Institute, on Stratospheric Ozone Depletion and Climate Changes
July 24, 1987	**Dr. Daniel L. Albritton**, Director of the Aeronomy Laboratory of the National Oceanic and Atmospheric Administration's Environmental Research Laboratories, on Stratospheric Ozone Depletion and Climate Changes
October 6, 1987	**Dr. Margaret Kripke**, Chief of the Immunology Department at the University of Texas Cancer Center, on Human Health Effects of Stratospheric Ozone Depletion
October 22, 1987	**Dr. Alan Teramura**, Associate Professor, Department of Botany, University of Maryland, on Biological and Terrestrial Impacts of Stratospheric Ozone Depletion
February 16, 1988	**Dr. Robert Worrest**, Project Leader, Research Program on Global Climate Change, Environmental Protection Agency, on Aquatic Impacts of Stratospheric Ozone Depletion and Global Warming
March 29, 1988	**Dr. Alan D. Hecht**, Director of the National Climate Program Office, on the Five Year Plan Issued by the Program Office

APPENDIX, continued

September 9, 1988	**Richard E. Sanderson**, Director, Office of Federal Activities, Environmental Protection Agency; **David E. Ketcham**, Director, Environmental Coordination Staff, United States Forest Service; **Ted Cress**, Office of Deputy Under Secretary for Research and Advance Technology, Department of Defense; **Jerry Peterson**, Chief, Floodplain Management Section and Coastal Resources Branch, Army Corps of Engineers; **Eileen Shea**, Office of Global Programs, and **Ben Miermet**, Office of Coastal Resources Management, National Oceanic and Atmospheric Administration; **Carol Borgstrom**, Director, Office of NEPA Project Assistance, Department of Energy; **Camille Mittelholtz**, Environmental Program Analyst, Department of Transportation; **Thomas E. Murley**, Director, Office of Nuclear Reactor Regulation, Nuclear Regulatory Commission; **Bruce Blanchard**. Director, Office of Environmental Project Review, Department of the Interior; and **David Wirth**, Natural Resources Defense Council; on Global Climate Impacts and the NEPA Process

STATEMENT BY FRANK G. VUKMANIC
DIRECTOR, OFFICE OF
MULTILATERAL DEVELOPMENT BANKS
DEPARTMENT OF THE TREASURY
BEFORE THE SUBCOMMITTEE ON
SUPERFUND, OCEAN, AND WATER PROTECTION
OF THE COMMITTEE ON
ENVIRONMENT AND PUBLIC WORKS
UNITED STATES SENATE
JUNE 1, 1989

Mr. Chairman. I am pleased to participate in this afternoon's hearings and to present the Department of the Treasury's views on the reauthorization of appropriations for the Office of Environmental Quality and S.1045, a measure that seeks to promote development of environmental assessments in international financial institutions. I would like to comment first on the draft amendment to clarify National Environmental Policy, extending NEPA procedures to extra-territorial actions of the U.S. Government, and then on S.1045.

Draft Amendment to Clarify National Environmental Policy

We would oppose legislation extending NEPA to international actions of the U.S. Government. We believe this approach is unworkable in the international context and especially in the international financial institutions. We have already expressed our concern about extending NEPA procedures to U.S. votes in the multilateral development banks. We are also concerned that the legislation would affect the International Monetary Fund. This organization emphasizes broad macroeconomic policy issues --

fiscal, monetary, and exchange rate measures -- that relate to balance of payments adjustment and economic restructuring. These measures do not appear to have direct effects on specific environmental issues. Efforts to deal with those environmental issues in the context of IMF programs could hamper the Fund's systematic responsibilities without having a significantly positive impact on the environment.

S.1045 - National Environmental Policy on International Financing Act of 1989

Let me now turn to Treasury's views on S.1045. We are supportive of the objectives of this legislation, which is to promote environmental reform in the multilateral development banks. Indeed, we have taken the lead internationally to encourage environmental impact assessment in the MDBs and early dissemination of environmental information on specific projects and programs.

On March 1, Secretary Brady sent a letter to President Conable "strongly recommending that the Bank consider ways that environmental information on specific projects may be made publicly available on a regular basis well in advance of Board review." I would like to provide a copy of that letter for the record because we believe that such public participation is essential to the environmental impact assessment process.

At the April 4 meeting of the Development Committee of the World Bank and IMF, Secretary Brady called for stronger attention to environmental reform in the MDBs. He asked specifically for internal environmental impact assessment procedures and procedures for providing environmental information about individual loans to non-governmental organizations and community groups. In response to the Secretary's statement, environmental issues were highlighted in the communique of that Development Committee meeting. Agreement was also reached that the subject should be included in the agenda of the September meeting.

The Treasury Department has encouraged greater attention to environmental impact assessment in statements given at the annual meetings of the regional development banks this spring. At the Asian Development Bank's Annual meeting, Assistant Secretary Dallara said he was hopeful that the process for assessing the environmental impact of projects and programs will become increasingly effective. At the Annual Meeting of the African Development Bank, Acting Deputy Assistant Secretary Fall said that establishment of environmental impact assessment procedures would be a critical factor in beginning to address that continent's enormous environmental problems.

Environmental impact assessment and early access to information are key conditions that the United States is now seeking to incorporate into the IDA-IX replenishment agreement. At the negotiations that took place in London last month, Assistant Secretary Dallara highlighted the importance we attach to these issues and called for a paper on them, to be discussed at the July or September replenishment meeting.

At the ministerial meeting of the Organization for Economic Cooperation and Development now in progress in Paris, Secretary Brady is pressing the organization to encourage the multilateral development banks to adopt environmental impact assessment procedures and to increase public access to environmental information about specific projects and programs. We are also calling for greater emphasis on energy efficiency and conservation and programs to promote alternatives to chloro-fluoro-carbons. We plan to take the same approach at the meeting of heads of state or government that is to be held in France in July.

The extent of this international initiative reflects the importance we attach to environmental issues, particularly environmental impact assessment and early disclosure of information. We believe these latter elements are the essential components of environmental reform in the multilateral development banks and in borrowing countries. However, we also want to emphasize that a key to success in this endeavor in the MDBs is the support of other member countries, both developed and developing. Unless we can succeed in developing broad-based member support we will not convince the MDBs and ultimately the borrowing countries to adopt effective EIA procedures or move to share relevant information with non-governmental organizations and other interested parties.

Last year the Treasury strongly opposed legislation similar to S.1045 because it incorporated provisions which unilaterally imposed U.S. environmental standards on the MDBs, an action which we believe is counterproductive. We want to compliment the drafters of S.1045. We believe this legislation goes a long way to eliminate some of the problems associated with last year's bill. In fact, this bill incorporates, in section 4, some of the changes we had suggested.

However, we are concerned about the basic thrust of the legislation, i.e., it calls for the identification and promulgation of criteria by the United States to apply to the loans of the multilateral institutions. Section 2 requires U.S. Executive Directors to request that the banks prepare detailed statements on their environmental impact assessments, using criteria developed unilaterally by the U.S. Council on Environmental Quality. The directors then must gauge the banks' statements against these CEQ-developed criteria. Any shortcomings in the assessments, as determined with reference to these U.S. generated criteria, would be reported to the public. We believe that asking for detailed statements and evaluation of the banks' work by U.S. criteria would be misconstrued as unilateral interference and set back our efforts to promote a multilateral consensus on environmental reform. We are convinced that we cannot achieve our goals in the banks without the support of other member countries.

The bill also contains some ambiguities with respect to the duties of the U.S. Executive Directors. It is not clear whether it is U.S. Executive Directors or the banks who are responsible for dissemination of information to the public under the EIA process. It is also unclear to what extent directors would have to seek relevant information beyond that which is provided by the banks. Will the directors have to make public confidential information provided by the banks? Will the directors' procedures be subject to judicial review and will private citizens be able to seek injunctions against U.S. actions for non-compliance with the environmental criteria? As it is written, this bill could impose onerous fact-finding, public relations, and reporting duties on the Executive Directors.

I would like to stress that Treasury shares the Committee's goals in this legislation. Therefore, we would like to propose a change which we believe addresses our mutual concerns while avoiding the problem of unilateral U.S. action. We propose replacing sections 106(b) and 106(c) of the bill with a provision to authorize the Secretary of the Treasury to initiate international discussions to develop criteria and procedures for conducting environmental impact assessments in the multilateral development banks. The goal of the discussions would be to develop in concert with other member countries in the banks internationally accepted criteria and procedures which could be adopted by the banks to guide their internal operations. We believe that this approach would address squarely the committee's concern about improving project design and appraisal with respect to environmental issues. Moreover, we would encourage the banks' making available to the public environmental information on specific projects and programs in advance of Board consideration. A year after the enactment of the legislation, the Secretary could report to the Congress on the development of these international criteria. Section 106(a) would have to be modified to reflect this new initiative.

I have one additional comment to make. Section 106(a), as it stands, would include in its coverage the International Monetary Fund. We strongly oppose this inclusion. As I indicated earlier, this type of legislation would hamper the Fund's primary work without advancing our efforts on environmental reform.

TESTIMONY OF
WILLIAM A. NITZE

DEPUTY ASSISTANT SECRETARY
FOR
ENVIRONMENT, HEALTH, AND NATURAL RESOURCES
DEPARTMENT OF STATE

BEFORE THE

SUBCOMMITTEE ON SUPERFUND, OCEAN AND WATER PROTECTION
COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS

UNITED STATES SENATE

JUNE 1, 1989

Mr. Chairman, thank you for the opportunity to testify this morning on the subject of a national environmental policy related to U.S. involvement in development financing by the multilateral development banks. It has long been the policy of the United States Government, both the present Administration and the previous one, to encourage the development banks and developing countries to take environmental factors into consideration when reviewing development funding proposals, and I applaud the interest of the Senate in desiring to further this goal.

In a report submitted to the Congress last October by the Reagan Administration*, we identified six conclusions related to the use of foreign assistance funds for environmental purposes. Since three of these are related to the multilateral development banks (MDBs), I would like to mention them here:

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*Sustainable Development and Natural Resources: A Strategy for U.S. Foreign Assistance. August 1988.

-- THE U.S. GOVERNMENT SHOULD ENCOURAGE FURTHER EFFORTS BY THE MDBS TO CONTINUE TO STRENGTHEN AND INSTITUTIONALIZE THE ENVIRONMENTAL ASSESSMENT PROCESS IN THEIR CONSIDERATION OF PROJECT PROPOSALS.

-- MDBS SHOULD COMMIT A LARGER PROPORTION OF THEIR RESOURCES TO ENVIRONMENTAL ENHANCEMENT AND CONSERVATION PROJECTS.

-- THE UNITED STATES SHOULD CONTINUE TO ENCOURAGE BORROWING COUNTRIES AND THE MDBS TO PROVIDE MORE TIMELY INFORMATION ABOUT THE ENVIRONMENTAL ASPECTS OF PROPOSED PROJECTS. NON-GOVERNMENTAL ORGANIZATIONS, PARTICULARLY IN BORROWING COUNTRIES, SHOULD ALSO BE ENCOURAGED TO PROVIDE INPUT TO THE GOVERNMENTS OF BORROWING COUNTRIES AND TO THE MDBS ON THE DESIGN OF PROJECTS AND THEIR POTENTIAL FOR ADVERSE ENVIRONMENTAL IMPACTS.

TOWARD THESE ENDS, AND MANY OTHERS, WE CONSULT CLOSELY AND FREQUENTLY WITH THE MULTILATERAL DEVELOPMENT BANKS, PARTICULARLY THE WORLD BANK. IT TAKES TIME TO MOVE ANY LARGE INSTITUTION, BUT I WOULD SAY THAT WE ARE PLEASED UP TO THE PRESENT WITH THE

MANNER IN WHICH THE WORLD BANK HAS DEMONSTRATED ITS RESPONSIVENESS TO A NUMBER OF OUR CONCERNS. WE HAVE GOOD REASON TO BELIEVE THAT THE REGIONAL DEVELOPMENT BANKS WILL QUICKLY EMULATE THE ENVIRONMENTAL REFORMS EMBRACED BY THE WORLD BANK.

THE BANK HAS CREATED AN ENVIRONMENT DEPARTMENT TO FOCUS ON ENVIRONMENTAL POLICY ISSUES. ENVIRONMENTAL EXPERTS ARE FOUND IN EACH GEOGRAPHIC DIVISION OF THE BANK. THESE EXPERTS HAVE BEGUN TO PRODUCE ENVIRONMENTAL ACTION PLANS FOR COUNTRIES WITH PARTICULARLY FRAGILE ENVIRONMENTS OR IN WHICH ENVIRONMENTAL DEGRADATION SERIOUSLY THREATENS. THE PRESIDENT OF THE BANK HAS STATED HIS INTENTIONS TO MAKE MORE INFORMATION AVAILABLE TO THE PUBLIC AND INTERESTED NON-GOVERNMENTAL ORGANIZATIONS. ONLY RECENTLY THE ENVIRONMENT DEPARTMENT HAS LAUNCHED A NEWSLETTER TO DISSEMINATE INFORMATION TO THE COMMUNITY CONCERNED WITH ENVIRONMENTAL ISSUES. WE EXPECT THE NINTH REPLENISHMENT OF THE INTERNATIONAL DEVELOPMENT ASSOCIATION (IDA) TO INCLUDE A REQUIREMENT FOR PROJECT ENVIRONMENTAL IMPACT STATEMENTS. AT THE IDA NEGOTIATIONS LAST MONTH, DONORS UNANIMOUSLY SUPPORTED A CALL FOR THE "EXPANSION OF COUNTRY ENVIRONMENTAL ACTION PLANS AND PROJECT ENVIRONMENTAL IMPACT STATEMENTS AND THE PROVISION OF MORE INFORMATION ON IDA'S PROGRAMS IN THIS IMPORTANT AREA."

S.1045, ON WHICH I HAVE BEEN ASKED TO COMMENT TODAY, WOULD GIVE ADDITIONAL IMPETUS TO THE MDBs IN ADDRESSING ENVIRONMENTAL CONCERNS. IT WOULD FORMALIZE AND RELEASE FOR PUBLIC SCRUTINY WHAT HAS TO DATE BEEN AN EVALUATIVE PROCESS CONDUCTED WITHIN THE MDBs THEMSELVES. IT WOULD ASSIST THIS PROCESS BY MAKING EMPLOYEES OF THE EXECUTIVE BRANCH OF THE UNITED STATES GOVERNMENT AVAILABLE, UPON REQUEST, TO THE MDBs TO ADVISE THE BANKS ON ENVIRONMENTAL ISSUES, TO ASSIST IN TRAINING BANK PERSONNEL, AND TO ASSIST IN CONDUCTING ENVIRONMENTAL STUDIES RELATED TO PROJECTS WITH POTENTIALLY SIGNIFICANT ENVIRONMENTAL IMPACTS.

THE OBJECTIVE OF ENSURING THAT STUDIES OF ENVIRONMENTAL IMPACTS ARE PROFESSIONALLY PREPARED WELL IN ADVANCE OF PROJECT APPROVAL BY THE EXECUTIVE BOARDS IS A GOOD ONE, WHICH THE ADMINISTRATION SUPPORTS. THE AUTHORITY TO SUPPLEMENT MDB EXPERTISE BY HAVING THE UNITED STATES GOVERNMENT MAKE AVAILABLE TO THE MDBs, IF REQUESTED, PERSONNEL TO ASSIST IN THE PREPARATION OF ENVIRONMENTAL STUDIES, IS ALSO USEFUL. HOWEVER, IF THE MDBs WERE TO REQUEST A LARGE NUMBER OF U.S. GOVERNMENT EXPERTS, THIS COULD LESSEN OUR ABILITY TO PERFORM THESE FUNCTIONS WITHIN OUR OWN AGENCIES. SINCE DISCRETION IS LEFT TO THE BANKS AS TO WHETHER TO REQUEST SUCH ASSISTANCE, THIS WOULD HOPEFULLY AVOID ANY ADVERSE REACTION WHICH MIGHT ARISE FROM A PERCEPTION THAT THE UNITED STATES WAS TRYING TO INSERT ITS OWN

EMPLOYEES INTO THE INTERNAL PROCEDURES OF THE BANKS. HOPEFULLY OTHER OFFERS OF TECHNICAL ASSISTANCE FROM OTHER NATIONS, BOTH DONOR AND DEVELOPING, WOULD BE FORTHCOMING, SO THAT THE PROCESS OF EVALUATING ENVIRONMENTAL FACTORS WOULD TRULY BE AN INTERNATIONAL ONE.

WE FIND OURSELVES, THEREFORE, IN GENERAL AGREEMENT WITH THE OBJECTIVES OF S.1045. WE HAVE BEEN PURSUING THE SAME OBJECTIVES IN OUR OWN DIALOGUE WITH THE MDBS, AND IN A NUMBER OF OTHER INTERNATIONAL FORA INCLUDING THE UN ENVIRONMENT PROGRAMME AND THE ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT.

WHICH BRINGS ME TO ONE IMPORTANT RESERVATION. I CANNOT HELP BUT WONDER IF THE ENACTMENT OF THIS LEGISLATION AT THIS TIME WOULD NOT PROVOKE AN ADVERSE REACTION WITHIN THE MDBS, THE RECIPIENT COUNTRIES, AND PERHAPS WITHIN THE DONOR COUNTRIES AS WELL. LEGISLATION AT THE PRESENT TIME MIGHT BE PERCEIVED AS ANOTHER CASE IN WHICH THE UNITED STATES ATTEMPTS TO DICTATE ITS OWN WILL, BY REQUIRING THAT INTERNAL BANK ENVIRONMENTAL ASSESSMENTS BE CIRCULATED WIDELY AMONG ANY INTERESTED PUBLIC OBSERVERS FOR ANALYSIS AND COMMENT, AND BY SEEKING TO INSERT

OUR OWN PERSONNEL INTO THE BANKS' ENVIRONMENTAL ASSESSMENT PROCEDURES. AS WE TESTIFIED BEFORE THIS COMMITTEE LAST YEAR, MR. CHAIRMAN, IT IS NOT POSSIBLE FOR ONE COUNTRY TO "LEGISLATE" OR OTHERWISE UNILATERALLY IMPOSE A SET OF REQUIREMENTS ON MULTILATERAL INSTITUTIONS. I DO NOT THINK IT PROPER FOR THE U.S. EXECUTIVE DIRECTOR'S OFFICES OR THE U.S. TREASURY TO PROVIDE THE INFORMATION RECEIVED FROM THE BANKS "TO BORROWER AND DONOR COUNTRIES". ALSO, I WOULD REPEAT WHAT MAY BE AXIOMATIC FOR THOSE OF US SO DEEPLY CONCERNED WITH THIS ISSUE--THAT IS, IN THE FINAL ANALYSIS THE CONCERN AND ACTIONS THAT COUNT IN SAFEGUARDING THE ENVIRONMENT MUST BE VESTED IN THE DEVELOPING COUNTRIES THEMSELVES.

CONSEQUENTLY, THE DEPARTMENT OF STATE URGES THAT THIS BILL BE MODIFIED SO AS TO ENABLE US TO CONTINUE OUR WORK ON THIS ISSUE THROUGH DIPLOMATIC CHANNELS. SPECIFICALLY, WE PROPOSE THAT SECTION 3 BE AMENDED TO REPLACE SECTIONS 106(B) AND 106(C) WITH A PROVISION TO AUTHORIZE THE SECRETARY OF THE TREASURY TO INITIATE INTERNATIONAL DISCUSSIONS TO DEVELOP CRITERIA AND PROCEDURES FOR CONDUCTING ENVIRONMENTAL IMPACT ASSESSMENTS IN THE MULTILATERAL DEVELOPMENT BANKS. THE GOAL OF THE DISCUSSIONS WOULD BE TO DEVELOP IN CONCERT WITH OTHER MEMBER COUNTRIES IN THE BANKS INTERNATIONALLY ACCEPTED CRITERIA AND PROCEDURES WHICH COULD BE ADOPTED BY THE BANKS TO GUIDE THEIR INTERNAL OPERATIONS.

WE BELIEVE THAT THIS APPROACH WOULD ADDRESS SQUARELY THE COMMITTEE'S CONCERN ABOUT IMPROVING PROJECT DESIGN AND APPRAISAL WITH RESPECT TO ENVIRONMENTAL ISSUES. MOREOVER, WE SHOULD ENCOURAGE THE BANKS TO MAKE AVAILABLE TO THE PUBLIC ENVIRONMENTAL INFORMATION ON SPECIFIC PROJECTS AND PROGRAMS IN ADVANCE OF BOARD CONSIDERATION. A YEAR AFTER THE ENACTMENT OF THE LEGISLATION, THE SECRETARY OF THE TREASURY COULD REPORT TO THE CONGRESS ON THE DEVELOPMENT OF THESE INTERNATIONAL CRITERIA.

THE PROGRESS WE HAVE MADE ON THESE ISSUES HAS BEEN SUBSTANTIAL, LARGELY BECAUSE WE HAVE WORKED CLOSELY AND COOPERATIVELY WITH BANK STAFF AND OTHER DONOR COUNTRIES TO ACHIEVE OUR GOALS. ALL OF THE CONCERNS OF INTEREST TO THE SENATE CONTINUE TO BE THE SUBJECT OF DETAILED DISCUSSIONS WITH EACH OF THE MDBS, INCLUDING AT THE TIME OF OUR PERIODIC DISCUSSIONS CONCERNING THE REPLENISHMENT OF THEIR RESOURCES.

***** *****   ***** *****   ***** *****   ***** *****

AT THIS POINT, MR. CHAIRMAN, I WOULD LIKE TO COMMENT BRIEFLY ON THE PROPOSED AMENDMENTS TO THE NATIONAL ENVIRONMENTAL POLICY ACT. THESE AMENDMENTS ARE VERY SIMILAR TO A BILL RECENTLY PRESENTED IN THE HOUSE BY CONGRESSMAN STUDDS. IN THIS PARTICULAR CASE, THE DEPARTMENT OF STATE HAS SERIOUS RESERVATIONS CONCERNING THE PROPOSED AMENDMENTS.

THE DEPARTMENT OF STATE RECOGNIZES THE NEED TO ENHANCE PROTECTION OF THE GLOBAL ENVIRONMENT AND STRONGLY SUPPORTS U.S. EFFORTS TO THAT END. THE DEPARTMENT HAS PLAYED AN ACTIVE ROLE IN THE NEGOTIATION AND CONCLUSION OF A SERIES OF INTERNATIONAL AGREEMENTS DESIGNED TO DEAL WITH PRESSING GLOBAL ENVIRONMENTAL CONCERNS. FOR EXAMPLE, WE EXERCISED A LEADERSHIP ROLE WITH RESPECT TO THE NEGOTIATION AND CONCLUSION OF THE MONTREAL PROTOCOL ON SUBSTANCES THAT DEPLETE THE OZONE LAYER. IN ADDITION, IN JANUARY WE HOSTED THE FIRST MEETING OF THE RESPONSE STRATEGIES WORKING GROUP OF THE INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, WHICH IS THE FOCAL POINT OF INTERGOVERNMENTAL

EFFORTS ON THE CLIMATE CHANGE ISSUE. AT THE SAME TIME, THE DEPARTMENT HAS PLAYED A LEADING ROLE IN THE CONCLUSION OF A NUMBER OF BILATERAL AGREEMENTS TO SOLVE MUTUAL ENVIRONMENTAL PROBLEMS AND CONTINUES TO PURSUE PROGRAMS FOR THE EXCHANGE OF ENVIRONMENTAL INFORMATION ON A BILATERAL AND MULTILATERAL BASIS.

WHILE THE DEPARTMENT SUPPORTS STRENGTHENED GLOBAL ENVIRONMENTAL PROTECTION, WE DO NOT BELIEVE THAT THE EXTENSION OF THE NATIONAL ENVIRONMENTAL POLICY ACT (NEPA) TO ACTIONS WITH EXTRATERRITORIAL IMPACTS IS AN APPROPRIATE MECHANISM FOR ADDRESSING GLOBAL ENVIRONMENTAL PROBLEMS. IN THE FIRST INSTANCE, WE CONSIDER THAT U.S. EFFORTS WOULD BETTER SERVE OUR OBJECTIVES IF THEY WERE TO FOCUS ON ADVANCING SUBSTANTIVE ENVIRONMENTAL GOALS ABROAD RATHER THAN FULFILLING PROCEDURAL REQUIREMENTS. THE DEPARTMENT OF STATE IS UNIQUELY SUITED TO EXERCISING LEADERSHIP IN THE INTERNATIONAL ENVIRONMENTAL ARENA AND SHOULD CONTINUE TO DEVOTE ITS ATTENTION TO PURSUING ENHANCED GLOBAL ENVIRONMENTAL PROTECTION THROUGH INTERNATIONAL COOPERATION.

EVEN ASSUMING THAT THE DEPARTMENT SHOULD FOCUS ITS ATTENTION ON PROCEDURAL RATHER THAN SUBSTANTIVE PURSUITS, THE AMENDMENTS AS DRAFTED APPEAR TO BE UNREALISTIC AND WOULD THEREFORE LIKELY BE UNWORKABLE. THE AMENDMENTS PROVIDE, FOR EXAMPLE, THAT THE NEPA REQUIREMENTS WITH RESPECT TO VOTES AND OTHER ACTIONS IN

INTERNATIONAL CONFERENCES AND ORGANIZATIONS COULD BE MODIFIED ONLY IF AN ALTERNATIVE BASIS EXISTS FOR ENSURING ADEQUATE ANALYSIS OF ENVIRONMENTAL IMPACTS. HOWEVER, THE DEPARTMENT HAS ALMOST NO CONTROL OVER THE SCHEDULING OF VOTES AND OTHER ACTIONS INVOLVING INTERNATIONAL ORGANIZATIONS. FOR EXAMPLE, MEETINGS OF THE UN SECURITY COUNCIL ARE OFTEN CALLED ON ONE DAY'S NOTICE. THE AMENDMENTS WOULD EFFECTIVELY PRECLUDE THE UNITED STATES FROM PARTICIPATING IN SUCH MEETINGS. IN THE CASE OF THE MULTILATERAL DEVELOPMENT BANKS, THE PROPOSED LEGISLATION WOULD DIVERT ATTENTION AWAY FROM THE ENVIRONMENTAL POLICIES OF THESE INSTITUTIONS AND THEIR BORROWERS, FOCUSING INSTEAD ON THE INTERNAL REVIEW PROCESS OF THE U.S. GOVERNMENT.

THE PROPOSED AMENDMENTS WOULD ALSO RAISE SERIOUS PROBLEMS WITH RESPECT TO THE CONDUCT OF FOREIGN RELATIONS. MANY NATIONS WOULD VIEW THE APPLICATION OF NEPA PROCEDURES TO ASSESS ENVIRONMENTAL IMPACTS OF AN INTERNATIONAL AGREEMENT OR OTHER U.S. ACTION OCCURRING WHOLLY WITHIN THEIR TERRITORY AS AN UNWARRANTED AND UNACCEPTABLE DEROGATION OF THEIR SOVEREIGNTY, SINCE IT WOULD APPEAR TO RELEGATE TO AN INFERIOR STATUS THEIR OWN DOMESTIC ENVIRONMENTAL REVIEW PROCEDURES AND POLICIES. THEY MIGHT ALSO OBJECT TO THE PUBLICATION BY A U.S. AGENCY OF INFORMATION AND ANALYSIS RELATED TO THEIR OWN ENVIRONMENTAL SITUATION.

IN ADDITION, DIPLOMACY OFTEN REQUIRES RAPID AND CONFIDENTIAL DECISIONS, IN WHICH ENVIRONMENTAL CONSIDERATIONS ARE ONE OF SEVERAL FACTORS. THE DELAYS AND WIDESPREAD DISSEMINATION OF INFORMATION THAT WOULD BE ASSOCIATED WITH THE PROPOSED AMENDMENTS MIGHT PRECLUDE FLEXIBLE RESPONSES TO COMPLEX FOREIGN RELATIONS PROBLEMS AND RENDER VIGOROUS AND EFFECTIVE DIPLOMACY EXTREMELY DIFFICULT. ACCORDINGLY, COMPLIANCE WITH THE PROPOSED AMENDMENTS COULD SUBSTANTIALLY HINDER THE CONDUCT OF U.S. FOREIGN RELATIONS.

IN THIS REGARD, WE NOTE THAT THE AUTHORITY TO MODIFY THE NEPA REQUIREMENTS WITH RESPECT TO CERTAIN FEDERAL ACTIONS WITH IMPACTS ABROAD WOULD REST WITH THE COUNCIL ON ENVIRONMENTAL QUALITY. GIVEN THE FOREIGN RELATIONS ASPECTS OF ANY DECISION ON WHETHER AND HOW TO MODIFY THE REQUIREMENTS, WE WOULD CONSIDER IT IMPERATIVE THAT THE DEPARTMENT OF STATE BE GIVEN AN INTEGRAL ROLE IN THIS DECISION-MAKING PROCESS.

THE DEPARTMENT ALSO QUESTIONS WHETHER THE UNITED STATES SHOULD BE PROVIDING A JUDICIAL FORUM TO FOREIGN PLAINTIFFS TO CHALLENGE U.S. ACTIONS HAVING EFFECTS WITHIN THEIR COUNTRIES. EXTENDING THE PROCEDURAL REQUIREMENTS OF NEPA COULD HAVE THIS EFFECT, EVEN IN CASES WHERE THEIR OWN COURTS WERE NOT OPEN TO SUCH CHALLENGES.

Giving NEPA an extraterritorial reach would also raise serious obstacles to U.S. peaceful nuclear cooperation with other nations. Such cooperation brings the U.S. not only obvious economic benefits, but more importantly an access to nuclear programs in other countries that provides a key support for non-proliferation, the pursuit of which is a fundamental national security and foreign policy objective. Our cooperating partners have longstanding doubts about the U.S. willingness to function as a reliable, predictable peaceful nuclear supplier. Unilaterally setting new environmental conditions would represent a change of far-reaching consequence in the terms and conditions of our nuclear cooperation with other nations. It might well prompt many of our partners to "go it alone", resulting in serious loss of U.S. influence in this critical area. The Department of State has consistently pointed out the foreign policy problems with applying NEPA to peaceful nuclear exports, for example, in the 1977 case of a U.S. reactor export to the Philippines. Moreover, as a practical matter the U.S. would simply not in any case be in a position to perform the data-collection and analytical functions called for by an environmental analysis or impact statement regarding nuclear activities that are properly under the jurisdiction of the regulatory agencies of the recipient country. We understand that the Nuclear Regulatory Commission holds similarly strong views about the impracticality of the U.S. Government carrying out these functions.

WITH RESPECT TO THE PROPOSED AMENDMENT TO SECTION 102(2)(F), WE AGREE THAT FEDERAL AGENCIES SHOULD PLAY AN ACTIVE ROLE IN DEVELOPING AND IMPLEMENTING POLICIES, PLANS, AND ACTIONS DESIGNED TO SUPPORT INTERNATIONAL EFFORTS TO ENHANCE THE QUALITY OF THE GLOBAL ENVIRONMENT. AT THE SAME TIME, WE CONSIDER THAT SUCH A MANDATE SHOULD BE WITHIN THE CONTEXT OF U.S. FOREIGN POLICY INTERESTS. AS YOU KNOW, THE EXISTING SECTION 102(2)(F) ADDRESSES THIS CONCERN BY PROVIDING THAT AGENCIES SHOULD LEND SUPPORT TO INTERNATIONAL ENVIRONMENTAL COOPERATION "WHERE CONSISTENT WITH THE FOREIGN POLICY OF THE UNITED STATES".

THEREFORE, IN CONCLUSION, WHILE WE APPRECIATE THE SUPPORT OF THE CONGRESS IN THOSE CASES WHERE WE ARE OR WILL SEEK ADDITIONAL AUTHORITY OR RESOURCES TO PURSUE ENVIRONMENTALLY SOUND OBJECTIVES, IN THE PRESENT CASE AT HAND THE DEPARTMENT DOES NOT BELIEVE THAT THE EXTRATERRITORIAL APPLICATION OF THE NATIONAL ENVIRONMENTAL POLICY ACT WOULD FACILITATE OUR WORK. THE DEPARTMENT OF STATE, THEREFORE, IS NOT ABLE TO SUPPORT THIS LEGISLATION.

THANK YOU, MR. CHAIRMAN

STATEMENT OF
EDWIN L. JOHNSON
DIRECTOR, DEVELOPING COUNTRIES STAFF
OFFICE OF INTERNATIONAL ACTIVITIES
U.S. ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE
SUBCOMMITTEE ON SUPERFUND, OCEAN AND WATER PROTECTION
COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS
U.S. SENATE
JUNE 1, 1989

Good afternoon, Mr. Chairman and members of the Subcommittee, I am pleased to appear before you today. At your request, I will discuss the Environmental Protection Agency's (EPA) views on the National Environmental Policy on International Financing Act of 1989 (S. 1045) and the draft reauthorization of the Office of Environmental Quality and proposed amendments to the National Environmental Policy Act (NEPA).

Before I focus on specific areas included in this legislation I would like to offer some general observations on NEPA. In the nearly twenty years since Congress passed NEPA this law has, on the whole, been an outstanding success in getting Federal decision-makers to consider and document environmental issues early in the planning stages for Federal projects. We see no need for major changes in the NEPA process.

While most public and Congressional attention has focused on specific, controversial Environmental Impact Statements (EISs) under NEPA, its most important contribution to environmental protection may well be the development of a consistent and uniform process for environmental evaluation and public disclosure across the entire Federal sector. Further, the process has become less burdensome as agencies integrate environmental reviews into their operating procedures, as they incorporate environmental considerations into early project design, and as they gain experience in writing environmental reviews. Thus, we at EPA now see approximately 425 draft and final EISs being produced annually, which is down from the peak of 1800 per year during the early 1970s. It should be noted that 10,000 to 20,000 Environmental Assessments (EAs), accompanied by Findings of No Significant Environmental Impact, are also prepared each year.

Nor is the success of NEPA limited to our Federal government. Twenty-seven States have developed some form of environmental review requirements applicable to State projects, and a number of foreign countries have adopted environmental review legislation modelled on the U.S. NEPA. EPA has further encouraged development of environmental review procedures by States in implementing the State Revolving Loan Fund (SRF), the successor to the Federal wastewater treatment plant construction grants program.

EPA believes that the NEPA process has paid off in real environmental benefits. In our own experience with wastewater treatment plants, for example, we found in a 1980 review of 58

EISs that over 70% of them resulted in greater protection of surface water quality. Induced development resulting from expanded capacity was controlled as a result of 50% of the EISs. Other areas of environmental concern positively addressed in significant numbers of the EISs were floodplains, wetlands, archaeological sites, open space and recreation, prime agricultural lands, and historic sites.

In addition, when we looked at EISs on EPA's wastewater treatment construction grant program we found that NEPA has helped assure judicious expenditure of public funds. While costs were incurred for preparation of EISs and, in some cases, because of project delays (especially during the inflationary period of the late 1970s), we also found that in half of the wastewater treatment projects cost reductions were achieved due to changes resulting from the EIS process. The net effect of an average EIS turned out to be a reduction in total project costs. As we strive to make government efforts both cost-effective and environmentally sound it is important to remember that the two goals are often compatible. NEPA is a sound and tested process for making U.S. decision-makers aware of the potential adverse environmental impacts of government actions.

EPA also acknowledges the important function carried out by the Council on Environmental Quality (CEQ) in coordinating environmental policy among Federal agencies, issuing guidance and regulation on NEPA implementation, resolving issues raised during environmental reviews, and issuing annual state of the environment reports. Certainly, CEQ is essential to EPA in carrying out our responsibility under section 309 of the Clean Air Act, which requires EPA to review and comment in writing on all major Federal actions subject to NEPA, proposed regulations and proposals for legislation. CEQ's role in resolving extremely controversial EISs or regulations referred by EPA under Clean Air Act Section 309 is fairly well known. Less known, but equally important, is the role CEQ plays in working with EPA and lead agencies to address EPA concerns at the draft EIS stage. This allows many problems to be resolved without going to referral, and the negotiation function carried out by CEQ is critical to developing environmentally acceptable projects.

You have requested our views on the structure of the Council on Environmental Quality, including proposals to establish an Office of Environmental Quality with a single director. EPA has not studied alternatives in detail, and any formal proposal for restructuring must be further developed within the Administration. We believe one option worth considering is a single Director managing an Office of Environmental Quality, and replacing two of the three Council slots with senior staff.

National Environmental Policy on International Financing Act of 1989 (S.1045)

I am pleased to offer EPA's comments on this legislation. The multilateral development banks (MDBs) are taking a number of constructive steps to develop environmental impact assessment procedures. We are particularly pleased with the leadership role that the U.S. played in helping the United Nations Environment Programme develop its goals and principles for environmental impact assessment. In our testimony last year we expressed strong support for the goal of implementing environmental reviews as an integral part of international development bank activity in which the United States participates. We expressed serious concern, however, with applying NEPA as a means of doing this.

S. 1045 takes a number of steps to address our concerns. Most importantly, the bill recognizes in sec. 2(6) of its findings that "methods and procedures for any environmental impact assessment should be adopted and utilized by the borrowing countries or international financial institutions themselves and cannot be imposed unilaterally by the U.S." EPA strongly supports the Committee's intent to strengthen rather than supplant the progress MDBs and developing countries are themselves making in developing environmental review procedures. The bill evidences this intent by not requiring the U.S.

Executive Director to develop independent environmental assessments and by allowing the Executive Director to review MDB-developed environmental assessments in accordance with internationally accepted processes rather than NEPA-based standards. In fact, the implementation provisions at section 4(b) and (c) effectively assist in the institutionalization of environmental review capabilities and procedures in the multilateral development banks.

However, we are concerned that the new NEPA sections 106(a) through (c) leave the bill still open to criticism by the multilateral development banks (MDBs) and borrowing nations as a unilateral imposition of U.S. standards. While the present text of S. 1045 may not impose such conditionality literally, negative perceptions and adverse reaction could override the potential benefits of this legislation's approach. Let me elaborate.

Section 106(a) provides that the Executive Director must request that each MDB prepare an environmental assessment which meets U.S. developed criteria. Treasury is required to review the assessment to determine which criteria are not met. Although, under 106(b), these CEQ criteria are to be based on "internationally accepted" procedures, they would still be seen as U.S. interpretations of desirable international practice. The comparison of the MDB product with the CEQ criteria required under 106(c) adds to the potential for adverse reaction.

We urge that section 106(a) be rewritten to invite the multilateral development banks to produce and make public environmental assessments of proposed projects under their particular procedures and criteria. In lieu of imposing the provisions of sections 106(b) and 106(c), the Secretary of Treasury, in consultation with CEQ, EPA and other interested agencies, could be authorized to begin international discussions toward agreement on appropriate procedures for environmental impact assessment in those MDBs where the environmental assessment procedure is thought to be weak. Treasury could be required to report to Congress in one year on the progress of those discussions.

EPA is fully prepared to support such an international initiative because, as is stated at paragraph 2(6) of the bill, we believe that the solution lies in international consensus rather than unilateral action.

We also understand that there is particular concern about applying the bill to the activities of the International Monetary Fund. The Fund considers broad macroeconomic issues relating to balance of payment problems. Application of the bill to the Fund would complicate its mission without direct benefits in promoting environmentally sound development projects and we would advocate omitting the IMF at least at this preliminary stage until we have more experience under the bill.

Returning to sections 4(b) and (c), we believe that these provisions capture the essence of the cooperative process the U.S. and other donor countries must undertake in order to promote improved consideration of environmental impacts by the MDBs. EPA is prepared to support these efforts to the extent resources permit.

In summary, we strongly support the principal goal of the bill as set out in your finding and applaud the progress made in the drafting of S. 1045 but feel that we should work together through the amendments we have suggested to prevent counterproductive perceptions of U.S. actions in this area.

NEPA Amendments

I would now like to address EPA's views on some of the changes to NEPA which have been proposed in the re-authorization of the Office of Environmental Quality.

(1) The amendment at section 3 of the proposed legislation amends NEPA section 204 to include CEQ authority to promulgate regulations governing implementation of NEPA by all Federal agencies, which shall provide for full consideration of environmental impacts of major federal actions on a number of global environmental concerns. This language appears to us to be

unintentionally limiting. EPA has supported amending section 204 of NEPA to make explicit the authority of CEQ to promulgate binding regulations governing the implementation of NEPA by all Federal agencies, including independent Federal regulatory commissions, without specifying types of impacts to be addressed. EPA does believe CEQ guidelines for the assessment of global commons impacts may be useful, and CEQ is currently working on such guidelines. However, we agree with CEQ that the statute should not be amended when regulations or guidance from CEQ under current law will suffice.

(2) It has been proposed to amend NEPA to require that each Federal agency review a statistically significant number of EISs prepared in which measures were specified for the mitigation of the adverse impact on the environment, and determine if mitigation measures were actually carried out. CEQ would be required to include a summary of these agency reviews in its annual report to Congress. EPA believes that a review of NEPA mitigation by Federal agencies (including EPA itself) may be useful. However, we believe the specific amendment being considered could be unnecessarily burdensome. It is not clear how many EISs would have to be reviewed to be statistically significant, nor how far back agencies should go in selecting EISs as samples. Since resources for a review of mitigation will undoubtedly have to compete with those needed for environmental assessments and EISs, the proposed requirements must be considered very carefully.

(3) Another amendment would change section 102(2)(C) to cover Federal actions which occur outside the boundaries of the U.S. This would apply NEPA to U.S. actions overseas which are not currently subject to NEPA. Some of these activities, however, are subject to environmental reviews under Executive Order 12114 ("Environmental Effects Abroad of Major Federal Actions"). As we stated in our March 1989 testimony before Congressman Studds' Subcommittee in the House, EPA is not convinced that applying NEPA beyond the global commons would achieve the desired result of ensuring that U.S. overseas actions are environmentally sound. It appears that the language in the draft is so broad that it would apply NEPA directly to U.S. votes in international organizations (e.g., multilateral development banks), which would be inconsistent with S. 1045.

(4) EPA supports section 1(c) of the draft legislation which will amend section 102(F) of NEPA to require Federal agencies "to work vigorously to develop and implement policies, plans, and actions to support national and international efforts to enhance the quality of the global environment." This is consistent with the emphasis which EPA believes must be given to global environmental concerns. We recommend that ",support," be added after "develop" to further clarify the range of activities in this area in which EPA is involved.

We have no comments on other proposed amendments.

Concluding Remarks

In summary, I want to leave you with the understanding that NEPA is fundamentally sound. It has generally worked well over the years and the results we have achieved in terms of environmental decisions have improved as Federal agencies have progressed in their understanding and application of the concepts and procedures of NEPA. With some refinement, I am confident that NEPA will continue to provide a sound framework for good environmental decisions in the years ahead.

NEPA is, in my judgement, one of the fundamental keys to the vision which this Administration has of a clean and healthy environment, while sustaining economic growth. Its successful application depends in large part on maintenance and perhaps enhancement of the existing system of checks and balances, of which CEQ is a vital part. EPA believes that the oversight role of CEQ in NEPA matters in general and in coordination of environmental policy among Federal agencies should be a strong one.

This concludes my prepared remarks. EPA will be available to work with the Subcommittee to develop statutory language that reflects these comments. I would be happy to answer any questions the Subcommittee may have.

II

101st CONGRESS
1st Session

S. 1045

To establish a National Environmental Policy on the participation of the United States in international financing.

IN THE SENATE OF THE UNITED STATES

MAY 18 (legislative day, JANUARY 3), 1989

Mr. SYMMS (for himself, Mr. BAUCUS, Mr. BURDICK, Mr. CHAFEE, Mr. MITCHELL, Mr. DURENBERGER, Mr. WARNER, Mr. LIEBERMAN, Mr. JEFFORDS, Mr. HUMPHREY, Mr. REID, Mr. LAUTENBERG, Mr. BUMPERS, Mr. GARN, Mr. COHEN, Mr. MOYNIHAN, Mr. CONRAD, Mr. McCLURE, Mr. MURKOWSKI, Mr. BREAUX, Mr. GRAHAM, and Mr. SIMPSON) introduced the following bill; which was read twice and referred to the Committee on Environment and Public Works

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A BILL

To establish a National Environmental Policy on the participation of the United States in international financing.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "National Environmental Policy on International Financing Act of 1989".

SEC. 2. FINDINGS.

The Congress finds that—

(1) the United States plays a significant role in determining the projects, policies, and lending practices of international financial institutions, devoting more financial resources to such institutions than any other nation;

(2) such institutions have failed in some cases to assess the environmental consequences of their actions, resulting at times in deforestation, desertification, erosion, water pollution, water-borne disease, and other manifestations of unsustainable development;

(3) while such institutions are making some progress in their environmental performance, assessment of projects for environmental consequences is not always consistent, timely, or publicly accessible;

(4) consistent, timely assessment and public scrutiny of the environmental and social impacts of proposed international financial projects are essential to ensure sustainable development;

(5) models for the conduct of such assessments exist in various forms, including, but not limited to—

(A) the National Environmental Policy Act, its regulations, and its history in the courts of the United States;

(B) the goals and principles of Environmental Impact Assessment adopted by the Governing

Council of the United Nations Environment Programme in June 1987; and

(C) the measures required to facilitate the environmental impact assessment of development assistance projects and programs recommended by the Council of the Organization for Economic Cooperation and Development at its 649th Meeting in October 1986;

(6) methods and procedures for environmental impact assessment should be adopted and utilized by borrowing countries or international financial institutions themselves, and cannot be imposed unilaterally by the United States; and

(7) the United States should encourage, to the extent possible, environmental impact assessment of the international financial activities in which it participates, with the goal of adoption by borrowing countries of their own procedures for assessing environmental impacts and alternatives.

SEC. 3. AMENDMENT.

Title I of the National Environmental Policy Act of 1969 (42 U.S.C. 4331–4335) is amended by adding at the end thereof the following new section:

"SEC. 106. (a) On and after July 1, 1991, at least 120 days prior to a vote of the United States on a proposed action, significantly affecting the quality of the human environment, by an institution listed in section 22 of the Export-Import Bank Act Amendments of 1986, the official responsible for casting such vote shall request of the institution a detailed statement which meets the criteria set forth pursuant to subsection 106(b). All information received as a result of such request shall accompany the proposal through agency review processes, and shall be made available to borrower and donor countries and to the public.

"(b) For purposes of this section, the Council on Environmental Quality shall identify and promulgate internationally accepted criteria for environmental impact assessment of international financial activities, sufficient to facilitate the consideration of environmental impacts in lending decisions. Such criteria shall include the solicitation of public comments, review of alternatives, and any other criteria found to be internationally recognized as an element of adequate environmental impact assessment.

"(c) The responsible official identified in subsection (a) shall not be required to verify the accuracy of the content of documents obtained under this section, except as necessary to identify—

"(1) minimum criteria which are not met; and

"(2) information pertinent to environmental impact assessment absent from the statement, but available to the responsible official through means other than the institution proposing the action.

A statement of findings under this subsection should accompany the proposed action through agency review processes, and shall be made available to borrower and donor countries and to the public.".

SEC. 4. IMPLEMENTATION.

(a) Within 30 days after the date of enactment of this Act, and as necessary thereafter, officials charged with requesting a statement under section 106(a) of title I of the National Environmental Policy Act of 1969 (as added by section 3 of this Act) shall—

(1) inform the management of the institutions listed in section 22 of the Export-Import Bank Act Amendments of 1986 of the expected nature of such statements; and

(2) begin negotiations with institution management and representatives of other institution members, within the framework of international agreements, as necessary to facilitate the conduct of environmental impact assessments.

(b) The Secretary of the Treasury, assisted by the Secretary of State, the Secretary of the Interior, the Secretary of Agriculture, the Administrator of the Environmental Protection Agency, the Chairman of the Council on Environmental Quality, the Administrator of the Agency for International Development, the Administrator of the National Oceanic and Atmospheric Administration, and representatives of other interested agencies, shall, in cooperation with institutions referenced in subsection (a)(1), make available upon the request of such institutions the appropriate United States government personnel to assist in the following areas—

(1) the training of institution staff in environmental impact assessment procedures;

(2) the provision of long- and short-term advisers on environmental issues;

(3) participation in preparing environmental studies for projects with potentially significant environmental impacts; and

(4) the preparation of documents for public release, and the development of procedures to provide for the inclusion of interested nongovernmental organizations in the environmental review process;

and shall encourage other institution member countries to provide similar assistance.

(c) The Secretary of the Treasury shall take steps with both donor and borrower nations to expand international consensus on the importance of environmental issues and to focus efforts on the need for reform, with particular emphasis on developing greater agreement on standards for projects that may affect ecosystems such as, but not limited to, tropical moist forests, wetlands, savannas, and other areas, and on securing greater support for programs and policies that encourage energy efficiency and conservation and integrated pest management.

SEC. 5. REPORTS.

(a) Within the 12-month period following the date of the enactment of this Act, the Secretary of the Treasury shall prepare and submit to the Committee on Environment and Public Works of the Senate, and the Committee on Merchant Marine and Fisheries of the House of Representatives, a detailed report containing an evaluation of the progress achieved by each international financial institution in adopting and implementing procedures for systematically assessing the environmental impacts of institution activities, and in the implementation of section 4. A copy of such report shall be made available to borrower and donor countries and to the public.

(b) The Council on Environmental Quality shall submit an interim progress report not later than March 1, 1992, and a detailed report not later than January 1, 1993, to the Committee on Environment and Public Works of the Senate, and the Committee on Merchant Marine and Fisheries of the House of Representatives, on the efficacy of efforts by the United States to encourage consistent, timely environmental impact assessment within international financial institutions. The report shall be made available to borrower and donor countries and to the public.

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II

101st CONGRESS
1st Session

S. 1089

To authorize appropriations for the Office of Environmental Quality for fiscal years 1989, 1990, 1991, 1992, and 1993, and for other purposes.

IN THE SENATE OF THE UNITED STATES

June 1 (legislative day, January 3), 1989

Mr. Lautenberg (for himself, Mr. Durenberger, and Mr. Chafee) introduced the following bill; which was read twice and referred to the Committee on Environment and Public Works

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A BILL

To authorize appropriations for the Office of Environmental Quality for fiscal years 1989, 1990, 1991, 1992, and 1993, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. CLARIFICATION OF NATIONAL ENVIRONMENTAL POLICY.

(a) Statement of General Environmental Policy.—Section 101(b) of the National Environmental Policy Act (42 U.S.C. 4331(b)) is amended—

(1) in paragraph (5) by striking "and" following the semicolon;

(2) in paragraph (6) by striking the period and inserting in lieu thereof "; and "; and

(3) by adding at the end the following new paragraph:

"(7) provide world leadership in ensuring a healthy and stable global environment.".

(b) ENVIRONMENTAL IMPACT STATEMENTS.—Section 102(2)(C) of the National Environmental Policy Act (42 U.S.C. 4332(2)(C)) is amended—

(1) by inserting after "major Federal actions" the following: ", including extraterritorial actions (other than those taken to protect the national security of the United States, actions taken in the course of an armed conflict, strategic intelligence actions, armament transfers, or judicial or administrative civil or criminal enforcement actions),";

(2) by striking clause (iii) and inserting in lieu thereof the following:

"(iii) alternatives to the proposed action that achieve the same or similar public purposes, including alternatives that avoid the adverse environmental effects described in clause (ii) and alternatives that otherwise mitigate those adverse environmental effects,";

(3) by striking "and" at the end of clause (iv);

(4) by striking the period at the end of clause (v) and inserting ", and" in lieu thereof;

(5) by adding the following new clause:

"(vi) measures that will be taken to mitigate adverse environmental effects if the proposed action is implemented."; and

(6) by inserting "and the public" immediately before the second period.

(c) FEDERAL AGENCY ACTION REGARDING GLOBAL ENVIRONMENT.—Section 102(2)(F) of the National Environmental Policy Act (42 U.S.C. 4332(2)(F)) is amended to read as follows:

"(F) recognize the global and long-range character of environmental problems and work vigorously to develop and implement policies, plans, and actions designed to support national and international efforts to enhance the quality of the global environment;".

SEC. 2. PRESIDENT'S STRATEGY FOR ENVIRONMENTAL PROGRESS.

Section 201 of the National Environmental Policy Act (42 U.S.C. 4341) is amended to read as follows:

"SEC. 201. Not later than January 31 of each year, the President shall transmit to the Congress a report which—

"(1) described the President's strategy for implementing the policy and objectives set forth in section 101 during that year;

"(2) describes areas of new or heightened environmental concern;

"(3) describes initiatives to strengthen and improve Federal environmental programs;

"(4) recommends priorities for national and international actions to protect the environment;

"(5) analyzes problems associated with the implementation of this Act and the effectiveness of measures specified in detailed statements of Federal agencies under section 102(2)(C) to mitigate the adverse environmental impacts of Federal actions; and

"(6) summarizes implementation of section 102(2(C) during the previous year."

SEC. 3. REGULATORY AUTHORITY AND APPLICABILITY.

Section 204 of the National Environmental Policy Act (42 U.S.C. 4344) is amended—

(1) by striking "and" at the end of paragraph (7);

(2) by striking the period at the end of paragraph (8) and inserting in lieu thereof "; and "; and

(3) by adding at the end thereof the following new paragraph:

"(9) to promulgate regulations concerning implementation of the National Environmental Policy Act by all Federal agencies (including Federal independent regulatory commissions). Such regulations shall assure compliance with the statutory requirement for full consideration of the environmental impacts of proposed major Federal agency actions on geographic, oceanographic, and atmospheric areas within as well as beyond the jurisdiction of the United States and its territories and possessions, including the cumulative impacts of proposed Federal actions on global climate change, depletion of the ozone layer, transboundary pollution, loss of biological diversity, and other international environmental impacts."

SEC. 4. REVIEW FUNCTIONS OF THE COUNCIL.

(a) ISSUANCE OF GUIDELINES FOR AGENCY REVIEW OF CERTAIN ENVIRONMENTAL IMPACT STATEMENTS.—Not later than six months after the date of the enactment of this Act, the Council on Environmental Quality (hereinafter in this Act referred to as the "Council") shall issue guidelines under which each Federal agency shall review a statistically significant sample of detailed statements prepared by the agency under section 102(2)(C) of the National Environmental Policy Act (42 U.S.C. 4332(2)(C)) in which measures were specified to mitigate adverse environmental effects.

(b) CONTENT OF GUIDELINES.—Guidelines issued by the Council under subsection (a)—

(1) shall establish the timing and frequency of reviews to be conducted by agencies under the guidelines; and

(2) shall require that Federal agencies examine—

(A) the accuracy of predictions of adverse environmental effects which were included in such statements, including predictions of impacts on fish and wildlife populations and habitats;

(B) the extent to which measures specified in statements under section 102(2)(C) of the National Environmental Policy Act to mitigate adverse environmental effects were implemented; and

(C) the effectiveness of those implemented mitigation measures.

(c) AGENCY REVIEWS.—Each Federal agency shall carry out reviews in accordance with guidelines issued by the Council under this section, and shall promptly submit to the Council the results of those reviews.

(d) SUMMARY OF RESULTS IN ANNUAL COUNCIL REPORT.—The Council shall include a summary of the results of the reviews carried out by Federal agencies under this section in the annual report of the Council transmitted to the Congress under section 201 of the National Environmental Policy Act (42 U.S.C. 4341).

SEC. 5. AUTHORIZATION OF APPROPRIATIONS.

Section 205 of the Environmental Quality Improvement Act of 1970 (42 U.S.C. 4374) is amended by adding at the end thereof the following:

> "(e) $1,000,000 for each of the fiscal years 1989, and 1990, and $1,500,000 for each of the fiscal years 1991, 1992, and 1993."

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